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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

NO. 206.

RAILROAD COMMISSION OF WISCONSIN, ET AL., *Appellants.*

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL., *Appellee.*

BRIEF ON REARGUMENT FILED ON BEHALF OF FORTY-FIVE STATES BY THEIR ATTORNEYS GENERAL AND OTHER COUNSEL AND BY THEIR RAILWAY AND PUBLIC SERVICE AND UTILITIES COMMISSIONS.

PARTIES TO BRIEF.

This brief is filed on behalf of the States of Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Montana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Okla-

homa, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming by their attorneys general and other counsel, and by their railroad and public service and utilities commissions, *amici curiae* only, except as to the State of Wisconsin.

STATEMENT OF FACTS.

A more extended statement of facts will be found, pages 7-17, in our First Brief, filed herein February 28, 1921.

Briefly, it may be said that before federal control passenger fares in Wisconsin were, on most lines, on the basis of 2 cents per mile. During federal control such fares were established on the basis of 3 cents per mile, and by section 208 (a) of the Transportation Act, 1920, they were continued in effect after federal control until changed by affirmative action of the state. The state took no action to effect a change.

On July 29, 1920, the Interstate Commerce Commission advanced interstate passenger fares 20 per cent. The carriers then applied to the Wisconsin Commission to authorize an advance of intrastate passenger fares in Wisconsin by the same percentage. The Wisconsin Commission, however, had no jurisdiction over passenger fares, and so ruled.

Thereupon the carriers applied to the Interstate Commerce Commission, hereinafter called the commission, asking that commission to prescribe passenger fares thereafter to be in force in Wisconsin. The commission, after a hearing, entered the order here in controversy, commanding the carriers to advance intrastate passenger fares in Wisconsin 20 per cent. A copy of the commission's report will be found in our

First Brief, page 7, (see also record p. 44) and the essential portions of the order on page 15 (see also record p. 50). Both were dated November 27, 1920. The order includes the report by reference.

On December 3, 1920, the defendant, an interstate carrier operating in Wisconsin, applied to the United States District Court for the Eastern District of Wisconsin for an injunction restraining the plaintiff from commencing any suit, or doing any act, to enforce the statutes of Wisconsin applicable to its fares and charges, or to prevent the defendant from collecting intrastate fares and charges in accordance with the order of the commission (record p. 1). A temporary restraining order was issued on that date (record p. 11) and on December 11, 1920, an interlocutory injunction was granted (record p. 17). This appeal was taken December 18, 1920, (record p. 19) and allowed on the same date (record p. 21).

SPECIFICATION OF ERRORS.

It is urged that the court erred in granting the injunction for the reason that the order of the commission, in support of which the injunction was granted, is invalid for the following reasons:

(1) That it appears from the order, which includes the report, that the Commission misconstrued the law under which it assumed to act, and that the order is based upon such misconstruction.

(2) That if the Commission has construed the law properly, then Congress in passing the law went beyond its constitutional power.

(3) That if the Commission's construction is correct, and the law is constitutional, yet the Commission has not proceeded in accordance with the law.

(4) The power of the federal government to act with respect to the internal commerce of any state is limited to the doing of that which is necessary for the effective regulation (including the protection) of interstate commerce. In the case of discriminatory intrastate rates it may require the discrimination to be removed, but it can not go further and prescribe the exact rates that shall thereafter be in force. Because the order of the commission attempts to prescribe such rates it is void.

ARGUMENT.

THE RIGHT OF A STATE TO REGULATE ITS INTERNAL COMMERCE IS RESERVED UNDER THE FEDERAL CONSTITUTION.

The right of a state to regulate its internal commerce is a sovereign right, reserved under the federal constitution, and not subject to invasion by Congress. Numerous decisions of this court are cited in support of this proposition in our First Brief, pages 17-19.

This right, however, is subject to the necessary limitation that Congress, in the regulation of interstate commerce, may do what is necessary to protect such commerce, even though the power of a state over its internal commerce is thereby affected. This was determined in *Houston & Texas R. R. Co.* v. *United States*, 234, U. S. 342, quoted from in our First Brief at page 19.

THE POWER OF THE COMMISSION AS TO INTRASTATE RATES BEFORE THE PASSAGE OF THE TRANSPORTATION ACT, 1920.

Before the passage of the Transportation Act, 1920, the commission exercised power under the Act to Regulate Commerce to require discrimination against

interstate commerce to be removed. The limits of its power, within the law as it then stood, had been settled in a series of decisions by the commission and by this court, which are cited in our First Brief, pages 21-31. The effect of these decisions may be stated as follows:

> "The mere maintenance of a rate for movement of traffic wholly within a state lower than a rate found reasonable by this Commission for the local state portion of a through interstate movement does not of itself constitute undue discrimination within the meaning of the Act." *Memphis Merchants Exchange et al. v. Illinois Central Railroad Company et al.*, 43 I. C. C. 378.

> "It is well settled that discrimination under the third section to be undue and unlawful must ordinarily be such that the prejudice arising out of it against one party is a source of advantage to the other alleged to be favored, and that generally a competitive relation between the commodities must appear. *Board of Trade of Chicago v. A. T. & S. F. Ry. Co.*, 29 I. C. C. 438, 443." *California Walnut Growers' Association et al. v. Aberdeen & Rockfish Railroad Company et al.*, 50 I. C. C. 558, 568.

> "Congress (in the proviso of section 1 of the Act) thus defined the scope of its regulation and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrastate rates and thus to establish *a unified control* by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly, in the absence of a finding by the Commission of unjust discrimination, intrastate rates were left to be fixed by the carrier and subject to the authority of the states or of the

agencies created by the states." *Houston & Texas Ry. v. United States*, 234 U. S. 342, 357.

> "Proceedings to remove unjust discrimination are aimed directly only at the relation of rates. If in such a proceeding an unreasonable rate is uncovered and that rate made reasonable, it is done as a means to the end of removing discrimination. The correction is an incident merely. * * * for the power of the Commission is dominant *only to the extent* that the exercise is found by it to be *necessary to remove the existing discrimination against interstate traffic.*" *American Express Company v. Caldwell*, 244 U. S., 617, 624, 625.

THE ORDER OF THE COMMISSION EXCEEDS THE POWER OF THE COMMISSION AS THE SAME EXISTED PRIOR TO THE PASSAGE OF THE TRANSPORTATION ACT.

The order of the commission involved in this case exceeds the power of the commission as settled in the cases which have been cited. In terms it requires the carriers to "desist from the undue prejudice, undue preference, advantage and unjust discrimination found in said report to exist" and to put into effect an advance in intrastate fares in Wisconsin of 20 per cent. This order was treated by the carriers as applying to *all* intrastate fares. We agree with the carriers and with the commission that it was intended so to apply.

It was, however, established in *Illinois Central Railroad* v. *Public Utilities Commission*, 245 U. S. 493, and we think will not be questioned, that an order requiring the abatement of discrimination can be no broader than the finding of discrimination which the commission has made.

If we turn to the report of the commission we discover the finding which is sought to be relied upon to be phrased in these words: "Following the New York and Illinois cases * * * we find that the increases made under *Ex Parte* 74 * * * result in *reasonable passenger fares* * * * for *interstate transportation* within the group considered in this proceeding, and that the *failure of said respondents to increase the standard intrastate fares and charges correspondingly* * * * has rsulted and will result in intrastate fares and charges *lower than the corresponding interstate fares and charges;* in undue prejudice to persons traveling in interstate commerce in the State of Wisconsin and between points in the State of Wisconsin and points in other states; in undue preference of and advantage to persons traveling intrastate in Wisconsin and in unjust discrimination against interstate commerce." (Record, p. 48).

With respect to this finding we make the following points:

(1) That it falls within the condemnation of this court's decisions in *Illinois Central Railroad v. Public Utilities Commission*, 245 U. S. 493, and *American Express Co. v. Caldwell*, 244 U. S. 617, 625, because it does not show "definitely the territory or points where those rates (the intrastate rates condemned) operate prejudicially against the interstate traffic which the order is intended to protect."

(2) That the order is based upon a mistake of law, and hence can not constitute a valid foundation for the order of the court under review.

The mistake of law is apparent from a reading of the language just quoted, but it is demonstrated upon an examination of the full report, and especially of the

argument therein whereby the commission leads up to the statement of the findings which have been quoted.

We have examined the report in our First Brief, p. 35-41, and have shown clearly that the conclusion of discrimination announced by the commission was deduced from the facts (found or assumed), (a) that Congress in section 15a of the Interstate Commerce Act, as amended by the Transportation Act, had ordered the commission to procure for the carriers a certain fixed return upon the aggregate value of all their property, employed in transportation, both interstate and intrastate; and (b) that to produce this return the commission had advanced interstate passenger fares 20 per cent; that the interstate rates resulting from said advance were reasonable; that the State of Wisconsin had failed to increase passenger fares intrastate in Wisconsin by a corresponding percentage, leaving such rates lower than the interstate rates; and that the transportation services for both intrastate and interstate passengers were performed under substantially similar circumstances and conditions.

In the Illinois case, referred to and in effect made a part of the report of the commission in this case, is stated the reasoning of the commission. (For an extended quotation therefrom see our First Brief p. 38).

Referring to paragraph (4) of section 13, as amended by the Transportation Act, 1920, the commission said:

> "The provision in question reiterates in effect what is stated in section 3, but in it Congress has gone further than declaring that there shall be no unreasonable advantage, preference, or prejudice as between persons and localities, as in section 3, and has forbidden and declared unlawful any un-

due, unreasonable or unjust discrimination against interstate or foreign commerce."

The commission then said:

> "The term "commerce" covers the entire field of transportation, the traffic itself and all the *instrumentalities* and *means of carrying it on.* * If without good reason the fares within a state are lower than those authorized and established for interstate application, intrastate passenger traffic will not contribute its just share to the passenger revenue of the carriers, and the carriers *may not earn the statutory return without further increases in the transportation charges on other traffic, including interstate commerce,* thus unjustly discriminating against such commerce."

It accordingly appears that the commission ruled that under the law, as amended by the Transportation Act, 1920, from the mere fact that intrastate fares are lower than those authorized and established for interstate application, "without good reason,"—that is, "good reason" in the opinion of the federal commission—it follows that "intrastate passenger traffic will not contribute its just share to the passenger revenue of the carriers, and the carriers may not earn the statutory return without further increases in the transportation charges on interstate commerce," thus unjustly discriminating against such commerce. This is a complete reversal of the legal rule before recognized.

Under this interpretation of the phrase "discrimination against interstate * commerce" a discrimination case, instituted by a carrier, is in effect nothing more nor less than a petition for an increase in intrastate rates, upon the ground that the rates do not

yield to the carrier sufficient revenue to enable it to make up the statutory return contemplated by section 15a.

This ruling of the commission, whereby a discrimination proceeding has ceased to be one as to the direct effect of the intrastate rate complained of upon the movement of interstate commerce, and has become an inquiry merely as to whether the intrastate rate yields to the carrier what revenue the commission thinks it ought to yield, we allege to be an error of law, clear upon the face of the record.

The court below made the same error in interpreting the statute, and sustained the commission's order upon the identical reasoning contained in the commission's report. (See quotation from the court's opinion in our First Brief p. 41—See Record p. 13).

THE COMMISSION CAN NOT ESCAPE A JUDICIAL REVIEW OF ITS ORDERS.

The carriers and the commission claim that the commission's report must be taken as sustaining the order, because it states in the form of a finding of fact that intrastate rates in Wisconsin "result and will result * in undue prejudice to persons traveling in interstate commerce, etc."

It is claimed that this is a finding of fact, and that the evidence not being before the court, it must be presumed to be supported by proper evidence. Furthermore, it is urged that the commission's findings of fact are not subject to judicial review.

Nothing, however, is better settled than that the commission can not avoid review of the lawfulness of an order made by it merely by incorporating in its report a statement that it finds the facts required by the

statute to be found to give it jurisdiction. This court has clearly held that statements of fact by the commission are ineffective, if it appears that the commission in making them acted under a mistake of law.

In *Texas & Pacific R. R. v. Interstate Commerce Commission*, 162 U. S. 197, the commission made findings of discrimination through the charging of export rates less than domestic rates. In its report the commission discussed the intent of the provisions of the Act under which it was proceeding, and construed the law, holding that the foreign origin of import freight, and the necessity on the part of the carriers to make low rates to secure it for transport, were not facts which they could properly consider.

The court held that the question of discrimination was a question of fact for the commission. But it then quoted from the commission's report, as to its powers under the Act, and said:

> "It is obvious that the commission in formulating the order acted upon that view of the meaning of the statute which is expressed in the foregoing passages. We have, therefore, to deal only with a question of law, and that is, What is the true construction? If the construction put upon the act was right, then the order was lawful, and otherwise not."

By merely using words out of the Act to make a statement in the form of a finding of fact, the commission can not prevent the correction of errors made in construing the statute under which it operates. In *Interstate Commerce Commission v. Northern Pacific*, 216 U. S. 538, the commission sought to establish a through route, having power to do so under the statute.

provided there was no other through route. The commission made a finding that there was no other through route. When the order came before the Supreme Court, it was urged, on behalf of the commission, that it had found as a fact that no other through route did exist, and that such finding was not subject to review. The court, however, read the report of the commission, and said:

> "The majority of the Commission plainly could not and would not have made the declaration in their order that there was no such through route but for a view of the law upon which this Court must pass."

And the Court set aside the order of the commission on the ground of mistake of law.

The commission, as we have seen, held that the amendments to the Transportation Act included in sections 13 and 15 gave it power to increase state rates for the purpose of causing the same to yield more revenue to carriers. To adopt words from the opinion of this court in the *Texas & Pacific case*, just cited: "If the construction put upon the act was right, then the order (of the commission) was lawful, and otherwise not."

THE AMENDMENTS RELIED UPON BY THE COMMISSION.

This brings us to an examination of the amendments contained in the sections referred to. These are set forth at length in our First Brief, pages 42, 45.

The questions to be determined with respect to these amendments are (1) whether they were intended by Congress to confer upon the commission the power which it now claims to exercise, and (2) if so, whether they are constitutional.

COMMISSION'S ORDER ABSOLUTELY DESTRUCTIVE OF STATE POWER.

Let us now examine critically the character of the order of the commission complained of.

This order involves all of the passenger fares in the State of Wisconsin (with minor exceptions of no moment). (It may also be added, as bearing on the character of the power claimed to be exercised by the commission, that in similar cases orders embracing all rates, freight as well as passenger, have been made. The Nebraska case, 60 I. C. C. 305, the Nevada case, 60 I. C. C. 623, the North Dakota case, 61 I. C. C. 504, the Arizona case, 61 I. C. C. 572.)

The order is unlimited as to time, being, in terms, to "remain in force until the further order of the commission." This form of order is authorized by section 15 (2) of the Interstate Commerce Act, as amended by the Transportation Act.

It was made upon the application of the carriers, which complained of rates established by the President, as to which no official body in Wisconsin having jurisdiction had acted, or been asked to act, or had

opportunity to act. In this respect the case resembled the New York case, 59 I. C. C. 290, heretofore argued in this court, and now under consideration. There is this difference only, that in Wisconsin the state commission did not have jurisdiction over passenger fares, whereas the New York Commission did have. It resembled also the Arkansas, Nevada, and Arizona cases, reported, respectively, 59 I. C. C. 471, 60 I. C. C. 623, and 61 I. C. C. 572. In these cases the commission frankly took the ground that, not being an appellate body, it could not require any application to be made to state authorities before the institution of proceedings before it to advance rates.

We have already referred to the reasoning upon which the commission based this order. It is superfluous to say that if the order is valid there has been, in practical effect, complete destruction of state power of regulation. If carriers are at liberty to apply directly to the commission for revision of their rates, and if orders made by the commission upon such applications may embrace any or all of the rates within a state, and result in completely displacing state power during the will and pleasure of the commission, it is obvious that state power of regulation has for all practical purposes been obliterated.

Having in mind the character of the order, let us now again refer to the reasoning of the commission for the purpose of discovering just what portions of the amendments before referred to are relied upon as giving to the commission the power which it claims to exercise. The following from the Illinois report will suffice for our present purpose:

> "Congress has gone further than declaring that there shall be no undue or unreasonable advan-

> tage, preference, or prejudice as between persons and localities, as in section 3, and has forbidden and declared unlawful '*any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.*' The term 'commerce' covers the entire field of transportation—the traffic itself and all the instrumentalities and means of carrying it on. * * * If, without good reason, the fares within a state are lower than those authorized and established for interstate application, intrastate passenger traffic will not contribute its just share to the passenger revenues of the carriers, and the carriers may not earn the statutory return without further increases in the transportation charges on other traffic, including interstate commerce, *thus* unjustly discriminating against such commerce."

Here, then are the words upon which the validity of the commission's order in this case depends. If "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce" may comprehend inadequacy of intrastate rates to yield such revenue from intrastate operations as the commission thinks the carriers ought to receive, the order may be valid; otherwise it is invalid.

COMMISSION'S CONSTRUCTION OF "DISCRIMINATION AGAINST INTERSTATE COMMERCE" INCONSISTENT WITH SETTLED MEANING OF THAT TERM.

The meaning of the term "discrimination against interstate commerce" was well settled by a line of decisions, both by the commission and by this court before the Transportation Act was passed. It is elementary that when a legislature in a statute uses

words which have an accepted meaning in judicial decisions, it will be presumed to have intended them to be interpreted according to such accepted meaning.

In the brief of Appellants, pages 21-25, are gathered together the cases in which the courts have used the term "discrimination against interstate commerce." It will be seen that it has been uniformly used as meaning the favoring of places or localities in such a way as to injure interstate commerce itself, and never as comprehending injury to the revenues of interstate carriers.

It is, however, earnestly argued that by the insertion of the words in the Act it must be assumed that Congress meant in some way to add to its effective provisions. Upon the first argument of the case it was suggested from the bench that these words were, in section 13 (4), "superadded to a provision forbidding unjust discrimination as against particular persons * (and) mean something additional * by ordinary interpretation, at least."

It is, nevertheless, to be remembered that section 13 (4) (as we hope by reference to its legislative history to demonstrate) was designed as a statutory statement of the effect of the Shreveport decision. The congress took the phrase "discrimination against interstate commerce" in almost exact form from this court's opinion in that case, and in *American Express Co. v. Caldwell*, already cited, and used it as a part of its description of the Shreveport power, which, under construction of section 3, had been held to be already vested in the commission.

Congress had no reason to expect that it was adding to the pre-existing power, derived from the prohibition of section 3 against discrimination as to persons and localities, for this court had said that prohibition

went as far as Congress could go. We quote the language of the court:

> "That an unjust discrimination in the rates of a common carrier, by which *one person or locality is unduly favored as against another* under substantially similar conditions of traffic, constitutes an evil is undeniable; and when *this evil consists in* the action of an interstate carrier in unreasonably *discriminating against interstate traffic* over its line, the authority of Congress to prevent it is equally clear. * * * It is apparent * that the evil of *discrimination* was the principal thing aimed at, and there is no basis for the contention that 'Congress intended to exempt any *discriminatory action or practice* affecting *interstate commerce* which it had *authority to reach*'." (Houston & Texas Ry. v. I. C. C., 234 U. S. 342, 356.

LEGISLATIVE HISTORY OF TRANSPORTATION ACT.

It is well settled that when a statute is capable of different constructions, reference may be had to the proceedings in Congress, and to evidence before committees, while the Act was under consideration, and to reports of committees and explanatory statements in the nature of reports, made by the committee member having the bill in charge. In support of this proposition cases are cited in our First Brief, page 46.

Origin of "Undue Discrimination" Provision.

If we look to the legislative history of the Transportation Act we find most convincing evidence that Congress intended to use the term "discrimination against interstate commerce" in the sense that the same had been theretofore used, and not for the pur-

pose of transferring final power over state rates to the commission.

The origin of the "undue discrimination" words is most significant. The Transportation Act was first introduced as H. R. 4378. Section 13 of the same contained language substantially similar to what is now section 13 (4), except that in place of the words "undue * * * discrimination against interstate or foreign commerce" appeared the words "undue burden upon interstate or foreign commerce."

The "undue * * * discrimination" words, upon which the commission bases its order, first made their appearance in the Cummins bill, so-called, introduced August 26, 1919, being S. 2906. This contained much of the language which was in H. R. 4378, finally reported as 10453, but in what is now section 13 (4), in place of the "undue burden" words, the words "undue, unjust, or unreasonable discrimination against interstate or foreign commerce" were included.

Opposition to "Undue Burden" Words by States.

Before the House Committee Mr. Elmquist appeared for the National Association of Railway and Utilities Commissioners and protested against the "undue burden" words. On this point he said:

> "It is our judgment that the introduction of the words 'undue burden upon interstate or foreign commerce' introduces a new element into the rate structure of the Federal Act, and it may ultimately give to the Interstate Commerce Commission authority to deprive the States of the Union of any power whatever over intrastate commerce. In that way this Congress will be doing indirectly what it has not the right to do directly under the

constitution. * * It is inconceivable to me, Gentlemen, that this committee will attempt in an indirect way to take from the States that power which they have reserved unto themselves. I fear that that will be the result of these words in the statute." (House hearings, pp. 1622-1623)

On the other hand, Mr. Clark, representing the federal commission, and Mr. William A. Wimbish, representing the Southern Traffic League, expressed the opinion that the "undue burden" words added nothing to the then existing law. (These statements are reproduced in our First Brief, p. 81 and 84, respectively).

The House committee did not change the "undue burden" words and reported the bill as H. R. 10453 on November 10, 1919.

DECLARATION OF HOUSE COMMITTEE AS TO INTENT.

In its report on the bill, report No. 456, the committee said that the bill "practically enacts into law the decision of the Supreme Court in the so-called Shreveport case * * while at the same time recognizing the regulating bodies of the several states." (For full quotation see First Brief, pp. 88-89.)

"UNDUE BURDEN" WORDS REJECTED BY SENATE

H. R. 10453 passed the House, containing the "undue burden" words. In the Senate it was rejected, S. 2906 being substituted by amendment. Upon nonconcurrence by the House in the amendment, the two bills came before a conference committee.

"UNDUE BURDEN" WORDS BEFORE CONFERENCE COMMITTEE

The National Association of Railway and Utilities Commissioners continued opposition to the "undue burden" words. A memorandum was filed with the

committee, from which we quoted at considerable length in our First Brief, pages 93-96. The following therefrom indicates the character of the protest made:

> "If this provision shall become law it will operate to deprive the State Commissions of their powers to make with final effect any rate, service or other regulatory order. * * The question involved is whether Congress desires to preserve the powers of the State Commissions or to destroy them."

The conference committee rejected the "undue burden" words and adopted the "undue * * discrimination" words of the Cummins bill. It is impossible for us, under the circumstances which have been stated, to conclude that all this had no significance. On the contrary, it seems clear that *the committee determined to accept the views of those who spoke for the preservation of state authority, and to refrain from any attempt to extend the power of the commission over what Judge Thom called the "undue inequality of rates."* (See his statement page 21 of this brief).

Suggested Amendment to Proviso in Section 1 Rejected.

This conclusion is confirmed when we consider the action of the Congress, through the House committee, upon a proposed amendment of the proviso in section 1. If under the "undue burden" provision of section 13 (4) the commission was to be empowered to advance intrastate rates deemed by it too low, that provision represented an invasion of the field of local regulation, never before attempted to be authorized by federal law, and wholly inconsistent with the proviso

in section 1. While, as we have seen, this was contrary to the understanding of Commissioner Clark, who believed the commission already had the desired power, it appears to have been the view of the person who drew H. R. 4378. It was proposed to amend this proviso by inserting the words "except as expressly provided in section 13 thereof."

The House committee, however, struck out these words, and they did not appear in 10453. It is not easy to reconcile this action on the part of the committee with an intent to put words into section 13 which should operate to the complete destruction of state power over intrastate rates.

THE HOUSE COMMITTEE REJECTED THE CARRIERS' PLEA FOR AN EXTENSION OF THE EXERCISE OF FEDERAL POWER.

Further confirmation of the conclusion above stated is also found in the absolute rejection by Congress of language which would have made clear the intent to grant the added power now claimed by the commission.

While H. R. 4378 was under consideration, on September 26, 1919, Judge Thom, representing the carriers, discussed the provisions of the bill. Concerning intrastate rates he said:

> "I want to say that, for the reasons I have indicated, we believe that there ought to be a strong and exclusive jurisdiction in the Interstate Commerce Commission. Suppose you take a different view. * We would propose that *it is essential* that you do not confine what you propose to a supervision of *the discriminatory character of rates*, but that you should also extend it so as to provide for the case of *undue inequality of rates*, and

therefore unjust inequality of burden of sustaining the interstate carrier." (House Hearings H. R. 4378, p. 2996).

Upon the request of the chairman of the committee, Judge Thom filed with the committee suggested language to accomplish the purpose aimed at by him, as follows:

> "The commission after full hearing, shall, as to carriers engaged in interstate commerce, make such findings and orders as will, in its judgment, *remove any undue inequality*, or undue or unreasonable advantage, preference, or prejudice as between persons, localities, commodities, or other traffic, in State and interstate or foreign commerce, respectively, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, which on the part of carriers engaged in interstate commerce, are hereby forbidden and declared to be unlawful, and such findings or orders shall be observed, while in effect. * * *" (House Hearings H. R. 4378, p. 3000).

We have here the clearly expressed opinion of Judge Thom, placed before the committee, that it was "essential that (the committee) not confine (itself) to a supervision of the *discriminatory character* of rates," but "provide for the case of "*undue inequality of rates.*"

The House Committee did not do this, and *it was in face of this emphatic opinion from the leading counsel for carriers that the Conference Committee struck out "undue burden" and adopted "undue * discrimination,"* thereby, as it seems to us, making it abundantly clear that the committee did not intend to re-

spond to the request of the carriers that Congress attempt to exercise federal power over intrastate rates.

Senate Committee Declared Transportation Act Did not Enlarge Commission's Jurisdiction.

In reporting the conference bill to the Senate, Chairman Cummins stated that it was not intended to carry the jurisdiction of the commission "beyond the exact point ruled by the supreme court" in the Shreveport case. (This report is quoted from at length in our First Brief, p. 99-101).

Concurrent Action of Congress on S. 641.

The concurrent action of Congress upon another bill, is also of the utmost significance in its bearing upon the probable intent of Congress as to exercising federal power over intrastate rates.

In *Northern Pacific Railroad v. North Dakota*, 250 U. S. 135, it was held that the President under the Federal Control Act had full power to fix all rates. That case was argued May 5, 1919. On May 23, 1919, a bill, S. 641, was introduced, transferring the rate-making power as to interstate rates from the President to the Interstate Commerce Commission. The decision of this court in the case cited, and to the effect stated, was rendered June 2, 1919. On June 4, 1919, S. 641 was reported, and on June 12, it passed the Senate. In its original form it provided as follows:

> "That no intrastate rates shall be increased until at least thirty days' notice of the proposed increase has been given to the shippers of the state in which the increase is proposed and a hearing granted."

This bill was sent to the House Committee on Interstate and Foreign Commerce. After a hearing the committee on August 13, 1919, made a report recommending passage of the bill with an amendment explicitly restoring to the state regulatory tribunals full authority over all changes in intrastate rates. (This bill and the House committee report No. 230 are quoted from at length in our First Brief, pp. 89-92. The history of the bill is also stated at length and in detail in the supplemental brief of appellants herein.) After passing the House, the bill was returned to the Senate, and was finally sent to a conference committee. The conference committee's final report was accepted by the House, October 30, 1919, and by the Senate, November 3rd. It was vetoed by the President, November 19, upon the ground that while the federal government was responsible for expenditures of the railroads it should retain control of rates.

It is scarcely conceivable that the same Congress, acting through the same committees, should exhibit such solicitude for the full recognition of the accustomed powers of the state as to restore the same absolutely during the period of federal control, while at the same time passing a bill which would operate to deprive the state authorities of the same powers upon the termination of federal control.

As to intent on this point we have a very clear declaration from the House committee. When H. R. 8347 was under consideration, Mr. Elmquist read from the report of the committee on S. 641 this statement:

> "The committee is of the opinion that jurisdiction over any new intrastate rates should rest with the state regulatory bodies."

He then inquired, and was answered as follows:

> Mr. Elmquist: "I take it that the declaration as to the state rate-making power *represents the opinion of the committee* as such."
>
> Mr. Sanders of Indiana: "*It does.*" (House Hearings, H. R. 4378.)

COMMISSION'S CONSTRUCTION OF SECTION 13 (4) INCONSISTENT WITH OTHER PROVISIONS OF TRANSPORTATION ACT.

Not only is the construction which the commission has given section 13 (4) inconsistent with the legislative history of the Act, but it is also apparently impossible of reconciliation with other provisions of the Interstate Commerce Act, which were added by the Transportation Act.

Provisions Safeguarding the Exercise of State Power

In Section 13 itself, in the paragraph immediately preceding paragraph (4) are provisions which explicitly contemplate the continued exercise of rate-making power by the states. These provide for joint conferences and joint hearings of the federal commission "and the authorities of any state having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of *such state bodies*, and *of the commission.*"

We think that this language was intended to comprehend two different classes of rate structures and practices, viz.: intrastate, subject to the jurisdiction of the "state bodies," and interstate, subject to the jurisdiction "of the commission."

We think it is clear also that the provisions mentioned were intended, so far as might be possible, to remove occasion for the exercise of the mandatory power of the federal government to remove discriminations against interstate commerce, that might be caused by intrastate rates. Whereas before the Transportation Act was passed the commission, upon a complaint of discrimination arising from rates prescribed by any state, might proceed to hear and determine the issues raised, without any regard to the state, it is now required to give the state notice, and to afford the regulatory authorities of the state an opportunity in joint conference or joint hearing to have a part in the proceeding. The object in view, it seems to us, is to insure that any facts peculiar to the local situation, which may justify local rates that might otherwise appear discriminatory, shall certainly be brought to the attention of the federal commission, and be understood by it. *The provisions evidence a solicitous intent on the part of Congress to protect state power in its proper exercise, which seems to us irreconcilable with an intent to destroy such power before it has had an opportunity to be exercised, as the order in this case will do, if it is valid.*

Limitation of State Power During Guranty Period.

Another provision of the Transportation Act inconsistent with the commission's construction of section 13 (4) is section 208 (a). This provision first appeared in H. R. 10453. It was inserted in response to representations made to the committee that some provision ought to be inserted in any bill terminating federal control, which should fix rates upon their then existing

basis for some period of time. Mr. Ehmquist, Commissioner Clark, and Judge Thom joined in such representations. (For their statements see our First Brief, p. 65-68.)

Section 208 (a) as first introduced provided for the fixation of all rates, as in force at the end of federal control "until thereafter changed by state or federal authority, respectively, or pursuant to authority of law." In its report concerning this section the committee said:

> "Without such a provision the rates, fares, charges, etc., authorized under Federal control would terminate immediately upon the termination of Federal control and would revert *to the status existing prior to the time they were changed or increased by order of the President.* By the insertion of the above section the existing rates, fares, charges, etc., are to continue in force and effect until changed by or pursuant to authority of law—that is, until changed by the appropriate regulatory body."

This was the report upon what is now the Transportation Act. The language quoted shows these two facts to have been recognized by the committee:

(1) That after federal control, but for the provisions of section 208 (a)—that is, in spite of sections 13 (4) and 15 (a) of the amended Interstate Commerce Act—the state rates would "revert to the status existing prior to the time they were changed or raised by order of the President." In other words, state laws would revive, and the state rates would become effective, and their status would be the same as before Federal control, viz.: they would again be subject to the final jurisdiction of state authorities in the same man-

ner as before the passage of the Transportation Act. It is unnecessary to say that when any person or thing has passed from the control of one sovereignty to the control of another, it cannot be said that its "status" has not changed.

(2) That after federal control (except as otherwise provided in said section 208 (a) there would be two classes of railroad rates, one subject to the regulation of state authorities and the other to regulation by the commission. The committee did not inadvertently use the term which we have commented upon in the last paragraph, for immediately afterwards, in its report, it said that the section would continue the rates in effect until changed "by or pursuant to authority of law—that is, until changed by *the appropriate* regulatory body." The committee clearly understood that when the roads were returned to private control the states would exercise their accustomed jurisdiction with respect to intrastate rates. It certainly had no idea that there would be *two* regulatory bodies functioning as to such rates, nor that the federal body would be "*the appropriate regulatory body*" to regulate such rates.

It may further be pointed out that when the conference committee eliminated the "undue burden" words from section 13 (4), which were doubtless believed by many to give the federal commission authority to advance intrastate rates, they added to section 208 (a) the words, "but prior to September 1, 1920, no such rate, fare or charge shall be reduced, and no such classification, regulation or practice shall be changed in such manner as to reduce any such rate, fare or charge, unless such reduction or change is approved by the Commission."

In reporting the bill from the conference committee to the House the Chairman of the House committee said:

> "It is apparent that *unless* we put in a provision of this kind, then *as soon as the Federal control is ended*, all the rates made under Federal control would cease, and *the rates would revert to their pre-contro' status,—both interstate and intrastate.*"

The express grant to the commission, in section 208a, of a limited power of supervision over intrastate rates, for a definite limited period, shows that Congress did not understand that it was by section 13 (4) committing to the commission permanent control over such rates.

In thus forbidding decreases in intrastate rates during the period of the federal guaranty, without the assent of the commission, the Congress was exercising its war power. (See authorities cited our First Brief pp. 138-e-138-h. For legislative history of section 208 (a) and quotations at length from committee reports, see said brief 138a-138d).

Reenactment of the Proviso of Section 1.

We have heretofore made mention of the refusal of Congress to amend the proviso in section 1 by the introduction of an exception. Not only did Congress make this refusal but it reenacted the proviso, no longer as a proviso, but in positive form. (See First Brief p. 98). When Congress did this it knew that this court in the Minnesota Rate Cases opinion had declared that this proviso defined the scope of the regu-

lation intended to be provided for by the terms of the Act. *The reenactment therefore constituted a particularly emphatic declaration of the intent of Congress not to encroach upon the field of state regulation beyond the extent to which it had originally done so indirectly by the prohibition against discrimination in section 3, which was to be repeated in what is now section 13* (4).

Discriminatory rates were held in the Shreveport case not to be within the intent of the proviso, because when interstate commerce was adversely affected the "question was not one of *discrimination* wholly within one state." While the proviso is that the Act shall not apply to "*transportation* wholly within one state," the court went so far as to hold that the words "transportation wholly within one state" did not apply to transportation from one point to another point in the same state, if such transportation, or the terms under which it took place, impeded the flow of interstate commerce. Accordingly discriminatory intrastate rates were held subject to the power of the commission.

It is doubtless too late now to argue that the Shreveport opinion ought not to be followed. It has been confirmed by later opinions, and has received legislative sanction. Nevertheless, a construction whereby the words "transportation wholly within one state" were made to mean "transportation wholly within one state, *except when such transportation results in discrimination not wholly within one state*" would seem to go as far as the court can possibly believe Congress intended to go in limiting the effect of the proviso. We are confident that it can not be further limited by attaching a meaning to "discrimination" which will place the en-

tire body of intrastate rates within the provisions of the act.

As has been before emphasized, this order, and other orders of the commission, involve whole bodies of state rates. To us it seems that they go to the point of implying bad faith on the part of Congress when it framed and passed the Transportaton Act. It would seem that they can have been made only upon the theory that while Congress was allaying the suspicion of the states, by saying in the opening section of the amended Act that it did not intend to encroach upon the exercise by the states of their accustomed powers of regulation, it was at the same time, in section 13 (4), inserting language under which it intended that this power might be absolutely taken away. No such assumption seems to us permissible.

This court has said:

> "*It can not be assumed that Congress sought to accomplish by indirection what it expressly disclaimed.*" *Minnesota Rate Cases*, 230 U. S. 352, 421.

If the states must conform their rates and fares to the rates and fares established by the commission for interstate traffic, it is superfluous to say that their power of regulation has been destroyed.

> "To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name while denying it in fact." (*Minnesota Rate Cases*, 230 U. S. 352, 417.)

THE COMMISSION'S FINDING OF DISCRIMINATION WAS PRODUCED BY A MISCONCEPTION OF SECTION 15 (a).

We now desire to examine carefully the main premise upon which the commission based its conclusion that inadequacy of the intrastate rates of an interstate carrier constitutes a "discrimination" within the meaning of section 13 (4).

This premise is that under section 15 (a) the commission is required to adjust rates so that the entire net railway operating income of the carriers in each group (from operations intrastate and interstate) shall equal the percentage return aimed at by the statute; and that therefore the commission must advance interstate rates sufficiently to make up any deficit in the prescribed return which arises by reason of inadequate intrastate rates.

It is by reason of this obligation to increase interstate rates for any such possible resulting deficit that the commission finds that inadequate intrastate rates constitute a "discrimination against interstate commerce," as that term is used in the statute. Under this construction of its language, section 15 (a) thus operates indirectly to give to the federal commission final jurisdiction over all intrastate rates, considered from the point of view of their productivity of revenue to the carriers, and regardless of their effect upon the movement of interstate commerce.

Does section 15a in fact require the commission to advance interstate rates to make up any deficit below the percentage return which may result from the carriers' intrastate operations?

What the section commands is, that the commission "in the exercise of *its* power to prescribe *just and rea-*

sonable rates shall * * adjust such rates so that carriers * will * earn * income equal *as nearly as may be* to a fair return."

What is the commission's "power to prescribe just and reasonable rates?" It is conferred in section 15, and extends only to the prescription of "what will be the just and reasonable" charges for "the transportation of persons or property * *as defined in the first section of this Act.*" Turning to section 1, we find therein provided that the provisions of the Act shall not apply to "transportation * wholly within one state."

The answer to the question first asked above is, therefore, that *by the very terms of section 15a* the only power which the commission is to exercise in the adjustment of rates is its power to adjust *interstate rates.*

The direction to exercise this power to fix just and reasonable interstate rates, so that the carriers shall earn the indicated return "as nearly as may be," means merely that the specified return is a goal towards which the commission is to aim. If rates prescribed by state authority shall chance to be too low, and because of that fact the net railway operating income shall fall short of producing a fair return on the aggregate value of all carrier property, it will still be "as nearly as may be" to that return, by reason of anything that the commission may do "in the exercise of *its* power to prescribe just and reasonable rates."

Nothing could seem more absurd than to argue that in the exercise of its power to fix "just and reasonable rates" the commission can advance rates that it has already fixed and established as reasonable, merely be-

cause of a failure of other rates to be placed upon a proper basis.

When just and reasonable interstate rates have been determined and established, the raising of them to make up deficiencies in intrastate rates (assuming such deficiency to occur) would amount to an unconstitutional taking of the property of shippers, whose right to receive transportation at a reasonable rate is no less protected by the constitution than the right of the carriers to receive a fair return. This right is absolute, and wholly unaffected by intrastate traffic, and returns to the carriers therefrom. *Smyth v. Ames*, 169 U. S., 466; *Minnesota Rate Cases*, 230 U. S., 352; *Northern Pacific Railway v. North Dakota*, 236 U. S., 585, 598.

In the last case it was said:

> "Certainly it could not be said that the carrier may be required to charge excessive rates to some, in order that others might be served at a rate unreasonably low. That would be but arbitrary action."

Opinion of Former Justice Hughes.

An opinion of former Justice Hughes, in which he discussed proposed provisions of this Act from another angle, but which is applicable to this very point, is reproduced in our First Brief, pp. 121-122.

Opinion of Hon. Edgar E. Clark.

Hon. Edgar E. Clark, while Chairman of the commission, joined in the decision of the commission in this case, and in other decisions based upon the theory that discrimination within the intent of section 13 (4) might

arise from a supposed obligation on the part of the commission to increase interstate rates, already deemed reasonable, if there should be a shortage of carrier revenues resulting from intrastate rates, nevertheless, since he entered private practice he has formed and expressed an opinion in exact accord with that which we now urge upon the Court.

Before the Senate Committee on Interstate Commerce on November 19, 1921, discussing the effect of section 15 (a) upon rates, he said:

> "The Commission is required to fix a rate which will give that result, *as nearly as may be*, and that discounts all of the errors in the prognostications for the future, and all of the economic conditions that may prevail in the country. * * * Paragraph 17 of Section 15-a of the Act * * * provides that 'The provisions of this section'—that is the entire section 'shall not be construed as depriving shippers of their right to reparation in case of overcharges.' * * * I refer to that as reinforcing the opinion I expressed this morning, and that, with the other qualifications contained in this section, discounts in advance the uncertainties of predictions as to future volume and movement of traffic and earnings, and discounts also the idea that the rate-making rule and the revenue provisions of it contemplate that the shippers shall be required *in any instance* to pay an *unreasonable rate*, either *individually or as a whole*."

Other Opinions.

While declarations, as to the intent of an Act, made by committee members after its enactment do not fall within the same category as like expressions in committee reports, while the Act was in course of passage,

nevertheless such expressions, if they come from men who are lawyers of eminence, skilled in the interpretation of statutes, are entitled to the same consideration as the legal opinions of other eminent members of their profession. Accordingly, in the foot-note we have reproduced certain such opinions recently expressed, concerning the construction of the portions of the statute under discussion herein.*

*From Part 1 of Report of Hearings Before the Committee on Interstate Commerce, United States Senate, Sixty-Seventh Congress, First Session on S. 1150 and S. 2510, Bills to Amend the Transportation Act, 1920, and for other Purposes, October 24 to November 2, 1921.

"Mr. Benton. I do not need to remind you that when the Transportation Act was under consideration, Congress was asked to include certain words designed to grant to the Federal Commission the power it now claims, and that it refused to include them; nor do I need to recall that when your chairman reported the bill, as it finally passed, to the Senate, he expressly stated that the bill did not extend the power of the Commission over intrastate rates. I refer to Congressional Record, volume 59, part 1, pages 142-143.

I desire to read in part what was said about that. Chairman Cummins said: 'Most of you, I am sure, are familiar with what is known as the Shreveport decision. The committee has attempted to simply express the decisions of the Supreme Court of the United States. We have not attempted to carry the authority of Congress beyond the exact point ruled by the Supreme Court in the cases to which I have referred; and the only thing we have done in the matter has been to confer upon the Interstate Commerce Commission the authority to remove the discrimination, when established in a proper proceeding before that body—an authority which it does not now have.'

If I may interject there I will say I understand that to refer to the power to prescribe a specific rate to take the place of the specific rate condemned, the power of the Commission before having been to condemn a rate but not extending to prescribing the specific rate to be put in effect.

The Chairman. I may state that I am still of that opinion.

Mr. Benton. You are still of that opinion as to what your intent had been?

The Chairman. No; of what we did." (p. 12.)

Interstate and Intrastate Commerce Can Not Be Arbitrarily Linked Together.

Over interstate and intrastate commerce the Federal Government and the State Governments are respectively sovereign. Neither sovereign may arbitrarily link the two classes of commerce together with the purpose or effect of indirectly controlling that commerce which it could not control otherwise.

This is strikingly illustrated by the opinion of this court in *Louisville & Nashville R. R. Co. v. Eubank*, 184. U. S., 27. The Kentucky court had held that the

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"Mr. Jackson. If you will look at the three Shreveport cases, Mr. Chairman, which were decided before this act was passed, you will find not only in the decisions of the Interstate Commerce Commission but in the decisions of the Supreme Court itself the use of the very words which you have used—'against interstate commerce'; so, in fact, the bill, as you drew it, Senator, contained the precise words of the Supreme Court of the United States.

The Chairman. That is the way we understood it, and that is why we put them in. * * * The only change that we made, the only one I understood we were making, was to put in the act these provisions in regard to giving the Interstate Commerce Commission the power, the authority which it did not have before, to substitute or prescribe a rate for the future to take the place of the rate which had been found to be unduly preferential or give unreasonable advantage to one person or locality." (p. 74.)

"The Chairman. * * * I agree with all you say with regard to the high motives which actuate the Interstate Commerce Commission. But the fundamental error that has been made, from my standpoint, if your statements of fact are sustained is in accepting the fact that the State rates are lower than the rates which had been issued by the Commission on interstate rates as conclusive evidence of discrimination, and of course that results in these frozen situations, of which you speak, and I do not believe that any member of the committee or any member of Congress ever intended to do anything of that kind. I never dreamed that the Interstate Commerce Commission would declare a rate discriminatory as against interstate commerce, unless it had investigated that particular rate and the traffic which moved under it and found that it did unjustly and unreasonably work to the disadvantage of the people outside of the State who were doing the same kind of business. That was our idea, I am sure. Now, this blanketing the whole country with a uniform advance in State rates, that is by groups, is the thing that has done all this harm.

long and short-haul clause of the constitution of that state embraced a long-haul from a point outside the state to one within the state, and a shorter haul in the same direction between points within the state. This court held the constitutional provision, so construed, invalid, "because it linked the interstate rate to the

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Senator Stanley. It appears from what the judge says that the Interstate Commerce Commission seems to have been impressed with the idea that a duty was imposed upon them to so arrange rates as to provide this 6 per cent return. And I agree with the chairman that there was no such intention upon the part of the framers of the law.

The Chairman. There was no such intention, and there is nothing in the act that could lead any reasonable person to any such conclusion as that." (p. 182.)

"Mr. Benton. * * * One of the things that our people here in this country learned in their childhood in school, and everybody has thought a fact not to be questioned, is that the right of local self government is a right that can not be taken away.

The Chairman. We do not intend to invade it. We do not intend to violate the Constitution if we can help it.

Senator Kellogg. And we have not done it yet, so far as I know." (pp. 189-190.)

Senator Pittman. If the rates in North Dakota were so low that they were confiscatory would not the courts have the right to correct that situation?

The Chairman. Of course.

Senator Pittman. Is not that the remedy for the condition in North Dakota whether the Interstate Commerce Commission decided it before the courts did or not?

The Chairman. Personally I believe so far as insufficiency of State rates is concerned, if it is put upon the idea to raise revenue, I have been unwilling to give to the Interstate Commerce Commission power to correct, even if we could do it constitutionally, that objection." (p. 192.)

"Senator Pomerene. Well, it is a serious problem. I think the State Commissions have had their troubles and I think there have been some most unfortunate rates made."

"Senator Poindexter. There have been some unfortunate opinions, apparently, and I think that what Congress should do with the power of the Interstate Commerce Commission would depend on their decisions to some extent.

The Chairman. The acts or the conduct of the Interstate Commerce Commission is that they have apparently misconceived the law and have gone forward and have taken possession of the entire State field without any evidence of the particular discrimination which the act was intended to remove." (p. 195.)

rate for the shorter haul and thus the interstate charge was directly controlled by the state law." (The quotation made is from a statement of the case in the *Minnesota Rate Cases*, 230 U. S., 352, 429.)

It is submitted that the rights of the states under the Tenth Amendment are no less securely guarded than those of the Federal Government under the commerce clause.

The general proposition above stated is emphatically supported by the decision of this court in the *First Employers Liability Case*, 207, U. S., 463. Congress had attempted to legislate with respect to *all* employees of interstate carriers. In its opinion, holding the Act unconstitutional, the court said:

> "The act being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of *any of their employees*, without qualification or restriction as to the business in which the carrier or their employes may be engaged at the time of the injury, of necessity *includes subjects wholly outside of the power of Congress to regulate commerce*. Without stopping to consider the numerous instances where although a common carrier is engaged in interstate commerce such carrier may in the nature of things also transact business not interstate commerce, although such local business *may indirectly be related to interstate commerce*, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, *having a purely local branch operated wholly within a State*. * * * As the act thus includes many subjects wholly beyond the power to regulate commerce and depends for its sanction upon that authority, it results that

the act is repugnant to the Constitution, and can not be enforced unless there be merit in the propositions advanced to show that the statute may be saved. * * *

It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which can not be availed of except upon such conditions as Congress may prescribe, *even although the conditions would be otherwise beyond the power of Congress.* It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, *would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures.*"

COMMISSION'S CONSTRUCTION OF SECTION 15-A VIOLATES FIFTH AMENDMENT.

The Commission's construction of section 15-a violates also the Fifth Amendment by taking the property of shippers without due process of law, and without compensation.

In our First Brief, pages 117-118, decisions of this court are cited holding clearly that unreasonable rates may not be exacted in order that public service corporations may earn a particular return. The value of the service to the public must be considered in fixing rates.

Under the Commission's construction of section 15-a, the level of rates is determined arbitrarily by the amount necessary to yield a fixed return to the carriers. The section, as it is construed, commands the Commission to fix a rate level that will produce the return, without regard to the worth of the services rendered in transportation to the public. To the extent that rates are thus exacted which are exorbitant and beyond the fair value of the services rendered, the property of those on whom the rates are imposed is taken without compensation or due process of law.

Furthermore, section 15-a (paragraph 5), in terms declares that the application of the rule will enable some carriers "to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property." This excess it is provided shall be divided equally between the earning roads and the Government.

The case presents this outstanding question: Where a state has by law prescribed rates upon certain railroads which permit those railroads to earn a fair return, can the Federal Government, under the Constitution, set aside those rates, and prescribe other and higher rates, and devote the proceeds of the increases in part to building up reserve funds for the receiving carriers, and in part to building up a contingent fund to be taken and used by the Government in fostering interstate commerce?

It was this feature of the law that was declared un-

constitutional by former Justice Hughes in the opinion just referred to.

Section 15-a Was Not Intended to Require Uniform Rates.

While said paragraph (5) of section 15-a does contemplate the earning by some carriers of unreasonable returns, it does not contemplate uniformity of all rates, even interstate. Upon this point the Commission appears to have fallen into a very clear error, which doubtless had a large part in leading it to attempt to compel uniform advances in intrastate rates.

What Congress evidently undertook to do was to provide for uniform rates upon *competitive* traffic, not upon *all traffic*. The purpose of the rule was very likely to bring rates on all roads to a higher level, so that some of the poorer roads might increase their earnings. There may be ground for argument that it is good policy for the Federal Government upon competitive traffic to allow some roads to earn more than a fair return, so that weak competing roads may be sustained. But the competitive traffic is ordinarily through traffic, which passes state lines, and is so subject to Federal regulation. Intrastate traffic, on the other hand, in very large part, is not competitive, being often confined to a single route.

Determination of Public Policy a Constitutional Right.

Moreover, the public policy which a state shall follow in the exercise of its constitutional right to regulate its internal commerce, is a matter to be determined by the state itself, and not by the Federal Government.

> "That the states might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on constitutional rights." *Erie R. R. v. Public Utilities Commission*, decided United States Supreme Court, January 3, 1921.

if control over intrastate rates is reserved to the states under the Constitution, as has heretofore been settled by this court, it is not to be believed that the Federal Government can evade this reservation by the simple device of determining what the profits of carriers from both intrastate and interstate business ought to be, and directing the Commission to make up any deficit resulting from intrastate operations by increasing interstate rates; and then by authorizing the Commission to exercise jurisdiction over the intrastate rates to prevent the occurrence of such deficit.

Assuming occurrence of such an advance of interstate rates, and resulting injury to interstate commerce, the injury would be caused by the imposition of the advance, compelled by the action of the Federal Government itself, and not by the rates imposed by authority of the states.

To illustrate, if the Federal Government by statute should direct the commission, whenever it might find that any state required the provision by carriers of separate passenger facilities to enable segregation of the races in intrastate commerce, to issue an order absolutely preventing the operation of interstate trains to and from that state, injury would be caused interstate commerce under the command of the statute, but it would be caused by the statute, and not by the police regulations of the states involved.

State statutes, applicable to intrastate traffic, requiring separate facilities for passengers of different

races, are within the police power of the states, and not in conflict with the commerce clause of the Federal Constitution. *Louisville, etc. Ry. v. Mississippi*, 133 U. S., 587, 591; *Chesapeake & O. Ry. v. Kentucky*, 179 U. S., 390; *South Covington, etc., Ry. Co. v. Kentucky*, 252 U. S., 399. The power to make police regulations of the character mentioned being a reserved power of the states, the Federal Government can not infringe upon it, either directly or indirectly, by any such device as is suggested. This is also true of the right to regulate charges applicable to intrastate transportation.

In the first case here cited the court said:

> "So far, therefore, as this class of transportation (intrastate) as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the states. *It has often been held by this court, and there can be no doubt about it, that there is a commerce wholly within the state, which is not subject to the constitutional provision*, and the distinction between commerce among the states and the other class of commerce between the citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, when the lines of these classes approach each other, to distinguish between the one and the other."

THE ARGUMENT OF EXPEDIENCY.

The court is asked to sustain the Commission's order upon the ground that it is necessary for the maintenance of our systems of transportation that the Federal Government shall be able to secure for them adequate revenue from all their operations. This is an

argument of expediency. We rest assured that the momentous questions involved here are not to be determined upon considerations of that character.

In construing the Act, of course the court may properly consider the situation as it existed when Congress passed the Act. It will also consider the situation which Congress had reason to expect would exist thereafter.

We maintain there was no apparent disposition on the part of the state authorities at that time to deny to carriers the opportunity to make fair earnings; and that Congress could foresee what later actually happened in rate proceedings before state bodies. This is portrayed upon the tabulation in our First Brief, page 160, showing the advances allowed by state authorities immediately following the Federal Advance Rate Case, 1920. It shows conclusively the falsity of the claim, so constantly urged, that the carriers can not obtain fair treatment from the state authorities.

Touching this point we refer to our First Brief, pages 157-161.

It may also be added that there was no necessity for Congress to attempt to make new laws to safeguard the right of carriers to earn a fair return from their intrastate operations. The Federal Constitution gives to them immunity from the laws of any state which attempt to prevent the earning by them of a fair return upon the value of their properties.

The Commission's construction of sections 13 (4) and 15-a attributes to Congress an attempt to use the commerce clause of the Constitution for the protection of property rights—a use for which it was never designed. Such rights are protected by the Fifth and Fourteenth Amendments through the agency of the courts.

ALLEGED CONVERSION OF TRAFFIC FROM INTERSTATE TO INTRASTATE.

The Commission in its report made the following statement:

> "A direct result of the practice of buying passenger tickets again at or near state lines, thereby defeating the through interstate fares, is to convert, so far as the revenues of the carriers are concerned, interstate commerce into intrastate commerce."

The importance of any such conversation as may in fact occur has been magnified here. It will be noted that the quoted language is a part of the argument in the Commission's report, and not of the findings upon which the Commission would appear to intend to base its order. Irrespective of this point, however, the practice, whatever may be its extent, is in no sense a burden on interstate commerce. It does not impede the movement of interstate passengers, and does not increase the cost of such movement, nor in any way operate to increase the amount which either interstate passengers or shippers must pay towards the operating expenses of carriers and the return to which they are entitled. This is true for the reason that the state charges must take care of that portion of expenses and returns which is proportionate to the volume of state business. If a passenger travels for a portion of any given journey intrastate instead of interstate, by so much he reduces the demand for revenue from interstate traffic, and correspondingly increases the demand upon intrastate traffic.

This branch of this new theory of discrimination has all the inherent weaknesses of the branch which deals

with losses on intrastate traffic from inadequacy of rates. It is based upon an assumption that the state governments will not function properly, and that the only way interstate carriers can be assured of reasonable returns from intrastate operations is through the assumption of power of control over such operations by the Federal Government.

There are certain provisions in the Constitution which safeguard against improper state rates, but these provisions are enforced by the courts. Congress never acts upon the assumption that the states will not function properly. It would require many statutes to provide for all possible contingencies if Congress were to proceed upon the theory that all state officials will try as hard as they can to make our dual system of government work badly, instead of upon the assumption that all officials, Federal and state, will endeavor to make it work well.

ABSURD CONSEQUENCES OF REVENUE THEORY OF DISCRIMINATION.

Obviously, if the carriers are permitted to make a fair return from their intrastate operations there can be no resulting financial disability and incapacity to carry on interstate operations. As has been stated, this right is clearly guaranteed by the Constitution, and is protected by the courts. There is no reason to think that Congress believed it must empower the Commission to assist.

The order of the Commission in this case attempts to prescribe the terms upon which intrastate transportation shall be supplied, for the purpose of insuring such profits thereon as the Commission thinks the carriers ought to make.

As we have heretofore earnestly urged, we think this passes beyond any power of Congress under the commerce clause of the Constitution, for it is in no sense regulation of interstate commerce. There is, moreover, no good reason to believe that Congress ever intended any such construction of the Act as would justify such an order. The absurd results that it would seem must follow from upholding it may be pointed out.

If the order is valid, does the duty of the Commission stop with the revision of intrastate rates on steam railroads? The Commission has made it clear that it does not.

In *William Wylie Beall v. Wheeling Traction Company*, 60 I. C. C., 600, the Commission acted upon the revenue theory of discrimination, and raised rates of fare fixed by municipal franchises in Ohio. These franchises are contracts which must be observed, this court has held, notwithstanding that but for the contracts the fares fixed thereunder would be confiscatory. *Columbus Railway, Power & Light Company v. City of Columbus*, 249 U. S., 399. The Commission's construction enables it to relieve from these contracts, if it is of the opinion that the rates they provide for are too low.

Upon reargument of the William Wylie Beall case, it was pointed out that the effect of the Commission's construction would be to subject to its jurisdiction a very great part of the street railroad rates in the United States. In its report on rehearing, 63 I. C. C., 220, 222, the Commission said:

> "We have not attempted or asserted the right to regulate the fares of a street railway for travel within a municipality."

Nevertheless, does it not logically follow that if inadequacy of rates *between municipalities* is a discrimination against the interstate commerce of a carrier, because it adversely affects its ability to function in its interstate business, inadequacy of rates *within any municipality* is a like discrimination?

If the answer of this question is in the affirmative, the fact that the Bay State Street Railway projects a few miles over the line from Massachusetts into Rhode Island, and that it carries interstate passengers, subjects every intrastate rate upon the one-thousand miles of its system in Massachusetts to Federal control. We submit that if the Commission's construction is correct, this absurd result has already been accomplished by existing law.

But does the Commission's jurisdiction stop with the revision of intrastate rates? If inadequacy of revenue resulting in part from an intrastate rate makes the rate a discrimination against interstate commerce, does not inadequacy of revenue resulting in part from police regulations make the regulations like discriminations?

If such a "regulation * * * imposed by authority of any state" requires grade crossing protection, or sanitary improvements demanded by considerations of public health or comfort, must not the Commission, under existing law, upon complaint, examine the regulation, and, considering the cost and the apparent justification for it, determine whether the "burden" which is imposed upon interstate commerce through the diminution of the carriers revenue is "undue?"

Furthermore, if the Federal Government can empower the Commission to set aside the laws of a state fixing the terms upon which intrastate transportation shall be rendered, because in the opinion of the Com-

mission the rates prescribed by such law are unduly low, and hence adversely affect the ability of the carrier to carry on its interstate operations, can it not also vest the Commission with power to revise the law of a state, or the judgment of a state taxing board, as to the taxes that such carriers shall pay to the state?

Also, if the power of the Federal Government goes beyond the point of protecting the movement of interstate commerce, and the right of persons desiring to move the same to do so on fair and equal terms, as compared with persons engaged in intrastate commerce, and if it enables the Federal Government to set aside state laws fixing intrastate rates for the purpose of increasing the earnings of interstate carriers to such an amount as the Federal Government believes they ought to receive, can not the Federal Government set aside state laws authorizing the use of motor trucks upon the highways, or can it not even prevent the construction of highways, which will operate to divert traffic from interstate rail carriers, and to decrease their earnings?

These suggestions may seem extreme, but we believe it must logically follow that the Federal Government can do all of these things, if it can constitutionally do what the order of the commission in this case attempts.

ASTONISHING SITUATION PRODUCED BY COMMISSION'S CONSTRUCTION.

As we have before stated, the commission, under its construction of the amendments contained in the Transportation Act, is making state wide orders, to continue in effect indefinitely, prescribing whole bodies of intrastate rates. If these orders are valid, then the rates

prescribed must be maintained by the carriers, "the law of any state or the decision or order of any state authority to the contrary notwithstanding." It would be difficult to devise a more effective scheme for the complete destruction of state power of regulation than has been accomplished by this Act, if the construction claimed be its true construction.

In this connection, and remembering the express proviso reenacted in section 1, excepting intrastate commerce from the effect of the Act, we direct particular attention to the following utterance by this court in *The Minnesota Rate Cases*, 230 U. S., 352, 421, heretofore already quoted in part:

> "It cannot be supposed that Congress sought to accomplish by indirection what it expressly disclaimed, or attempted to override the accustomed authority of the states without the provision of a substitute."

In view of these words, and of the complete disablement of the state to remedy any just complaints of its citizens, let us see what substitute, if any, has been provided by Congress in the Transportation Act, as the Commission construes it.

(*b*) Intrastate Shippers and Passengers are Left Without a Substitute Method for Procuring Relief from Unjust or Discriminatory Rates.

In the New York case the commission said:

> "Inasmuch as the basis of our jurisdiction is our power to regulate interstate commerce, it follows that the decisive factor is whether the rates under consideration injuriously affect interstate

commerce. It is no answer to this to say that if the conclusion be admitted it may have the effect of completely displacing state jurisdiction over state commerce. * * *

This should not be construed as holding that jurisdiction over intrastate rates and fares has been taken away from the states and reposed in us. We find nothing in the law to indicate that such was the intent of Congress." (Record, pp. 96-98.)

This can mean nothing else than that the Act gives the commission jurisdiction over intrastate rates only when they are claimed and found to be unduly injurious to interstate commerce. *But if the intrastate rates are merely unreasonably high, they do not injure interstate commerce; and if they merely create discriminatory situations as between intrastate shippers, they do not injure interstate commerce.* So far as the removal of discrimination is concerned, section 13 (4) provides power to the commission only as to cases of discrimination as between "intrastate commerce on the one hand and interstate or foreign commerce on the other hand."

If, then, in a state where the commission has made a state-wide order, a passenger or shipper shall go before the rate regulatory authorities of the state with a complaint, either as to the reasonableness, or as to the discriminatory character, of intrastate rates, such authorities must say to him that they are disabled by the Federal order. If he comes to the Federal commission with the same complaint, the commission must say to him that it has no jurisdiction to entertain his complaint. So long as the order stands it locks up the whole body of intrastate rates, without power in any tribunal, state or Federal, to inquire into questions of reasonableness or discrimination, and to grant relief.

It has now become common knowledge that the statewide orders of the commission do in fact produce the greatest hardship, particularly by removing the schedules of rates applicable to freight traffic, in which occasion for necessary changes is constantly arising, beyond the effective control of any body, state or Federal. The conditions obtaining in the States of Illinois and Nebraska, which are among the states which have had all their freight rates and passenger rates (with the usual minor exceptions) prescribed by Federal order, were graphically portrayed by statements made to the Senate Committee in the hearing on S. 1150 and S. 2510, bills to amend the Transportation Act, 1920. (The Illinois situation page 101, the Nebraska situation pages 122 and 199.)

The commission itself has recognized the hardship produced by rigidly prescribing bodies of rates, and it has attempted to modify such hardship. The amendment to the order in this case, which is set out in our supplemental brief, represents one effort in that direction. Under the terms of that amendment (which is now incorporated in all similar orders) no carrier is required to maintain any intrastate rate "which is greater than its corresponding rate applicable to the transportation of property in interstate commerce from, to, or at the same points in effect on the date hereof, or greater than its corresponding rate contemporaneously in effect and applicable to the transportation of property in interstate commerce."

Another attempt is represented by a paragraph which the commission is now inserting in all orders advancing bodies of state rates, which is as follows, the quotation being from the order in the Missouri case, 64 I. C. C., 233:

> "*It is further ordered*, That nothing contained in this order shall be construed as prohibiting any carrier named in this order from increasing any rate for the transportation of property in intrastate commerce, provided such increased rate does not exceed its corresponding rate contemporaneously in effect and applicable to the transportation of property in interstate commerce, and provided further that such increase is made pursuant to the laws of the State of Missouri and with the approval of the authorites of said state."

Under these provisions, devised by the commission, a carrier may voluntarily reduce an intrastate rate to the level of any interstate rate existing on the date of reduction (and although the interstate rate may have been put into effect subsequently to the order of the commission) which may be deemed "corresponding." The carrier, with the consent of the state authorities, may also advance intrastate rates above the level prescribed in the order, provided the advance does not carry the intrastate rates above the level of the carriers "corresponding rate * * * in interstate commerce." But there is no body that can hear and act upon complaints.

THE COMMISSION'S ORDER CAN NOT BE SAVED UNDER SECTIONS 2 AND 3 OF ACT.

An attempt is made to save the validity of the order of the commission by claiming that it may be sustained under sections 2 and 3 of the Interstate Commerce Act, without regard to the new power claimed under sections 13 (4) and 15a.

So far as section 2 is concerned, the purpose of it has been very clearly declared by this court, as follows:

> "The purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, to the same destinations under the same circumstances of carriage, are compelled to pay different prices therefor." *Interstate Commerce Commission v. Alabama Midland Ry.*, 168 U. S. 144.

Section 2 can not be wrested to the support of this order, unless the court is prepared to reverse *Texas and Pacific Railroad v. Interstate Commerce Commission*, 162 U. S. 971, and later cases, in which it has been held that the physical incidents connected with the actual transportation of traffic are not the only "circumstances and conditions" which the commission should consider in the determination of alleged preference or advantage under the section. While, to an extent, and in some cases, those incidents may be similar as between interstate and intrastate transportation, yet other circumstances are different; the kinds of traffic are different, and upon any investigation o the value of carrier property, devoted to the two classes, and the operating cost involved in the transportation of the two classes, differences would undoubtedly appear. The assumption, without proof, that, as per unit of traffic per mile, they coincide can not be entertained.

As to section 3, if the report and order taken together are capable of the construction that the commission found every intrastate rate in Wisconsin discriminatory (which we deny), nevertheless the order can not be sustained upon the theory that it must be assumed there was evidence to support the finding. This would be to disregard the error of law, which is evident on the face of the report.

In view of the discussion of the commission, it is at least probable, and we think entirely certain, that the commission considered whatever evidence was before it under the influence of its mistaken belief that inadequacy of rates from a revenue point of view might be given weight as tending to establish discrimination. The language in the Illinois case, referred back to in the report of this case, which shows this, has been before set out herein.

Former Chairman Clark of the commission lately expressed his opinion as to what the decisions of the commission in these rate cases mean, as follows:

> "I want to correct another impression that seems to have been gleaned from what has been said here, that the Interstate Commerce Commission has held that a mere difference between the state and interstate rates constitutes undue prejudice or undue discrimination. The commission never held that in any case. *In everyone of these cases the Interstate Commerce Commission has held that under the powers vested in it, under the duties laid upon it by the Transportation Act, it had authorized certain increases in the interstate rates, and that the failure to make corresponding increases in the state rates constituted and created and perpetuated the unjust discrimination and undue prejudice.*" (Hearings before the Committee on Interstate Commerce, United States Senate, 67th Congress, First Session on S. 1150 and S. 2510, Bills to amend the Transportation Act, 1920, and for other purposes, November 19, 1921.)

That the commission was proceeding, not under section 3, but under the new portions of the act contained in sections 13 and 15a, is also quite clearly conceded in the commission's brief, page 11, as follows:

> "In making the aforesaid report, findings and order, the commission acted under authority conferred, and in response to duties imposed, upon it, by paragraphs (3) and (4) of section 13 and paragraphs (2) and (3) of section 15a, of the interstate commerce act."

Since our first brief was prepared, additional orders have been made by the commission advancing whole bodies of state rates as follows: *Louisiana Rates, Fares and Charges,* 60 I. C. C. 467; *Georgia Rates, Fares and Charges,* 60 I. C. C. 527; *Florida Rates, Fares and Charges,* 60 I. C. C. 551; *Nevada Rates, Fares and Charges,* 60 I. C. C. 623; *North Dakota Rates, Fares and Charges,* 61 I. C. C. 504; *Arizona Rates, Fares and Charges,* 61 I. C. C. 572; *Surcharge for Transportation of Passengers in Sleeping or Parlor Cars in Alabama,* 62 I. C. C. 153; *Kansas Rates, Fares and Charges,* 62 I. C. C. 440; *Tennessee Rates and Charges,* 63 I. C. C. 160; *Missouri Rates and Charges,* 64 I. C. C. 233.

It is impossible to consider the fact that the commission, in the comparatively few months since the Transportation Act was passed, has made twenty-five orders of the character in question, under which the intrastate rates in twenty-five states have in large part, (and in some instances altogether, except only commutation rates and other rates of no moment) been withdrawn from the regulatory power of the states, without the conviction that the commission, in making these orders, acted upon the consideration of matters which it did not formerly consider under sections 2 and 3. Everybody ought to want, and we think does want, a decision on the question whether additional power, justifying the action of the commission in these

cases, has in fact been granted to it. The interest of the carriers, and of the states, and of the nation demand such a decision as early as it may be given by the court. It was in recognition doubtless of this fact that the government joined in the motion to advance this case for argument.

It would indeed be most unfortunate if, the case, having been argued, the record should be thought to be in such shape as not to call for a decision by the court upon the question which has been mainly discussed,—and that is, whether the amendments contained in the Transportation Act vest the commission with additional power, under which it may review the reasonableness of intrastate rates.

THE FEDERAL GOVERNMENT CAN NOT PRESCRIBE STATE RATES.

We have alleged as a separate ground of invalidity that the order of the commission in this case attempts to prescribe the exact rates to be hereafter applied to intrastate passenger traffic in Wisconsin.

In this respect the order is in conformity with section 13 (4). We allege the unconstitutionality of the statute, so far as it attempts to authorize the order.

As was stated in *American Express Company v. Caldwell*, 244 U. S., 417, "the power of the commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic."

It is not necessary in order to remove discrimination caused by unduly low rates that the Federal Government shall prescribe the exact rates to be thereafter charged. In attempting to give to the commission the

power to prescribe such rates Congress overlooked the fact that it does not have, and can not under any circumstances have, *rate-making* power as to intrastate rates. As to such rates the only power it can ever exercise, or authorize the commission ever to exercise, is that which is necessary to remove discrimination.

The commission may indicate to what extent rates found discriminatorily low must be advanced to remove the discrimination found, but it can not require that they shall be fixed at the exact level that would be produced by making that advance. The importance of this point is evident. The present order attempts to punish the offending State of Wisconsin because, between the date of the termination of Federal control and the date of the institution of these proceedings, its legislature did not convene and pass a new fare statute. The punishment measured out is the deprivation of all power hereafter to regulate its passenger fares, so long as the commission continues in force its order. This we submit, goes beyond the necessity of the case, which in no event demands more than that the rates within the state shall be put on a basis which no longer causes injury to interstate commerce. If this is done, the Federal Government can have no further concern with those rates, nor power over them.

While this order of the commission stands, however, the state's power of regulation is wholly destroyed. If the order required merely that the rates be advanced to a certain level, there would remain the power to regulate the rates above that level. The practical utility of such remaining power might or might not be large, but where constitutional rights are involved, the extent to which they will be exercised has nothing to do with their existence.

COMMISSION DISREGARDED PLAIN REQUIREMENTS OF THE ACT IN ITS PROCEDURE.

We allege that the commission has disregarded plain requirements of the Act as to procedure in the following respects:

(1) It did not determine the aggregate value of the property of carriers in each rate group designated by it, as is by the Act required.

(2) It did not give to the railroad commission of Wisconsin the opportunity to take part in the proceedings respecting the rates complained of, in joint conference or joint hearing, as required by section 13 (3).

For our argument as to the illegality of the commission's procedure in these respects, we refer to Part II of our First Brief, pages 162-179.

For a complete statement concerning the participation of three state commissioners in the *Ex Parte* 74 rate case before the Federal Commission, and for our argument as to the effect of such participation, we refer to our First Supplemental Brief, pages 8-21.

Opinion of Senator Cummins.

As the view of one skilled in the construction of statutes, upon the point of the intent of the Act as to cooperation, we call attention to the statement of Senator Cummins, set out in the foot-note hereto.*

* "The Chairman. I think the act gives to the Interstate Commerce Commission original jurisdiction. We put into the act a clause which gives the carriers, for the first time, I think, the right to complain of a discriminatory State rate; and I think the carrier under the law would have the right to go directly, if it does exercise it, to the Interstate Commerce Commission and say that your rate on a certain commodity is unduly discriminatory against interstate commerce upon that commodity.

ITALICS IN QUOTATIONS.

The italics in quotations in this brief are our own.

CONCLUSION.

For all the reasons hereinbefore urged, the court is asked to declare that the findings and orders of the Interstate Commerce Commission in *Ex Parte* 74, and in its Docket No. 11763 are illegal and void, and to disaffirm and set aside the order for an interlocutory injunction in the court below herein appealed from.

Then I think comes the cooperation which the act provides for between the Interstate Commerce Commission and the State Commissions. If the Interstate Commerce Commission finds upon testimony that that rate does unjustly and unduly affect shippers or dealers or producers outside the State, if that is its finding, why, then we gave it the power to say what that rate shall be; in other words, to remove the discrimination. " " "

Mr. Shaughnessy. Yes, but jurisdiction over every rate in Nevada was taken by the Interstate Commerce Commission.

The Chairman. That fact does not establish discrimination at all. You may have a level of rates in a State on commodities and where business is done that may be lower or higher than rates outside upon the same commodity or business without disturbing in the least the competition between the people who enter into the business. Suppose in my own State we had a rate on potatoes from a place 30 miles out of Des Moines into Des Moines. No matter what that rate was no human being could say that it affected interstate commerce; would affect the shipment of potatoes anywhere. That is my idea about it."

Respectfully submitted,

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Alabama Public Service Commission,
Arizona Corporation Commission,
Public Utilities Commission of Colorado,
Public Utilities Commission of Connecticut,
Railroad Commission of Florida,
Railroad Commission of Georgia,
Public Utilities Commission of Idaho,
Commerce Commission of Illinois,
Public Service Commission of Indiana,
Board of Railroad Commissioners of Iowa,
Public Utilities Commission of Kansas,
Railroad Commission of Kentucky,
Public Service Commission of Louisiana,
Public Utilities Commission of Maine,
Public Service Commission of Maryland,
Michigan Public Utilities Commission,
Railroad and Warehouse Commission, Minnesota,
Railroad Commission of Mississippi,
Public Service Commission of Missouri,
Board of Railroad Commissioners, Montana,
State Railway Commission of Nebraska,
Public Service Commission of Nevada,
Public Service Commission, New Hampshire,
Board of Public Utilities Commissioners, New Jersey,
New Mexico State Corporation Commission,
Public Service Commission of New York,
Transit Commission of New York,
Corporation Commission of North Carolina,
Board of Railroad Commissioners, North Dakota,
Public Utilities Commission of Ohio,
Corporation Commission of Oklahoma,
Public Service Commission of Oregon,
Public Service Commission of Pennsylvania,
Public Utilities Commission, Rhode Island,
Railroad Commission of South Carolina,
Board of Railroad Commissioners of South Dakota,
Railroad & Public Utilities Commission, Tennessee,
Railroad Commission of Texas,
Public Utilities Commission of Utah,
Public Service Commission of Vermont,
State Corporation Commission of Virginia,
Department of Public Works, Washington,
Public Service Commission of West Virginia,
Railroad Commission of Wisconsin,
Public Service Commission of Wyoming.

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*Since this brief has been in course of preparation C. M. Cureton has been appointed Chief Justice of the Supreme Court of the State of Texas, and W. A. Keeling has succeeded him as Attorney General.

Supreme Court, U. S.
FILED
JAN 26 1921
JAMES D. MAHER,
Clerk

No. [redacted]206

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

RAILROAD COMMISSION OF WISCONSIN, AND CARL D. JACKSON, H. E. TRUMBOWER, AND JOHN S. ALLEN, AS MEMBERS OF AND CONSTITUTING THE RAILROAD COMMISSION OF WISCONSIN, JOHN J. BLAINE, INDIVIDUALLY, AND AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, FRANK G. MEYER, INDIVIDUALLY AND AS DISTRICT ATTORNEY OF GRANT COUNTY, STATE OF WISCONSIN, APPELLANTS,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

STATEMENT IN SUPPORT OF MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

RAILROAD COMMISSION OF WISCONSIN, and Carl D. Jackson, H. R. Trumbower, and John S. Allen, as members of and constituting the Railroad Commission of Wisconsin; John J. Blaine, individually and as Attorney General of the State of Wisconsin; Frank C. Meyer, individually and as District Attorney of Grant County, State of Wisconsin, Appellants,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellee.

No 694.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

STATEMENT IN SUPPORT OF MOTION TO ADVANCE.

While the United States is not a party to this suit, there is involved the validity of an order of the Interstate Commerce Commission. The case involves the authority and jurisdiction, respectively, of the Interstate Commerce Commission and the railroad

commissions of the various States. The order involved is one of general application throughout the United States and is being contested by the railroad commissions of several of the States. It is of very great importance to the public, to the Government of the United States, and the governments of the various States that the matter be speedily determined. The Solicitor General, therefore, on behalf of the Government, as amicus curiæ, joins in the request of the appellants that the case be advanced.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

JANUARY, 1921.

○

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

No. ——

RAILROAD COMMISSION OF WISCONSIN, and CARL D. JACKSON, H. R. TRUMBOWER and JOHN S. ALLEN, as members of and constituting the Railroad Commission of Wisconsin; JOHN J. BLAINE, individually and as Attorney General of the State of Wisconsin; FRANK C. MEYER, individually and as District Attorney of Grant County, State of Wisconsin,

Appellants,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Appellee.

Motion to Advance Hearing of Appeal

Now come the appellants above named, and move this honorable court to advance the hearing and argument in the above entitled cause, and set the same

down for hearing on February 28, 1921, or on some other early or particular day to be fixed by the court.

In support thereof appellants represent to the court:

That the matter involved in said appeal is as follows, to wit: the appellants are officers of the state of Wisconsin, charged with the duty of enforcing the laws of that state relative to the transportation of passengers in commerce wholly within that state, and charged with the duty of protecting the rights and interests of the people of the state of Wisconsin to transportation in such commerce at and for a legal rate of fare. The plaintiff railroad company is a common carrier engaged, among other things, in the conduct of the business of transportation between points wholly within the state of Wisconsin.

That in a proceeding before the Interstate Commerce Commission, known as Ex Parte 74, Increased Rates, 1920, 58 I. C. C., 220, that body authorized an increase of 20% in interstate passenger fares and charges, excess baggage charges, and also a surcharge upon passengers in sleeping and parlor cars amounting to 50% of such charge, to accrue to the rail carriers, by all steam railroads subject to its jurisdiction, in a rate group established by it, including the state of Wisconsin; that such increased rates, fares, and charges pursuant thereto were established by such carriers effective August 26, 1920; that subsequent thereto said Interstate Commerce Commission, after investigation and on or about November 27, 1920, entered an order in form, wherein and whereby it was ordered that the appellee herein and other carriers by steam railroad in the state of Wisconsin, parties to such proceeding, should put in

force and maintain sur-charges upon passengers traveling in sleeping cars and in parlor cars in intrastate commerce within the state of Wisconsin, which should correspond with the sur-charges authorized to be made by said carriers, and put into effect under said order No. Ex Parte 74, upon passengers traveling in interstate commerce within the state of Wisconsin and between points in the state of Wisconsin and points in other states; that the rates of fare purported to be authorized by said order have been put into force and effect within the state of Wisconsin by appellee and other carriers within said state since December 11, 1920; that the rate of fare for the carriage of passengers upon the line of appellee was fixed at two cents per mile by the legislature of Wisconsin by statute duly adopted in 1907; that the same was increased to three cents per mile by order of the Director-General during the period of federal control.

That prior to December 11, 1920 the appellee herein filed its bill of complaint in the District Court of the United States for the Eastern District of Wisconsin, praying for an injunction restraining appellants from seeking to enforce the provisions of the laws of Wisconsin against appellee, and from interfering or preventing appellee from charging and collecting the intrastate rates, fares, and charges set forth in said order of the Interstate Commerce Commission, and said bill of complaint likewise prayed for an interlocutory injunction imposing a like restraint upon appellants pending a final hearing of said cause; that after hearing on December 11, 1920 by three judges, as provided by the statutes, the application for an interlocutory injunction was granted.

Insert after word "maintain" line 1, page 3:

a like increase in passenger fares and charges, excess baggage charges, and

That this is an appeal from such order granting the interlocutory injunction so prayed for by appellee, plaintiff below; that such appeal was allowed by the United States District Court for the Eastern District of Wisconsin on the 18th day of December, 1920.

Appellants further submit that the special and peculiar circumstances which require that the hearing of the present case should be taken up out of its order on the docket and set down on some early and particular date, are, (1) the very large financial interest of the people of Wisconsin and of the public generally and of the carriers by steam railroad throughout the country involved in the determination thereof, and (2) the large public and governmental interest involved in a determination of the exact scope of the power and authority entrusted to the Interstate Commerce Commission, and the power and authority remaining to the legislatures and regulating bodies of the various states.

(1) The order appealed from involves the payment by citizens of the state of Wisconsin of passenger fares in the aggregate annually exceeding by $2,400,000 the amount which would be paid by them under the rate of fare established by the Director-General of Railroads during the period of federal control, and in the aggregate annually exceeding by $6,000,000 the amount of fares that would be collected under the rate of two cents per mile fixed by the statutes of Wisconsin. Like orders involving large increases in the amount of revenue to be collected for passenger transportation have been made as to the rates of fare in substantially all the states of the union. The authorities of a considerable number of such states have not acquiesced in the order of the Interstate Commerce Commission, and

controversies are now pending, involving the same principle as the present action, and involving large differences in the amount of fare to be paid by the public in said states and collected by the carriers therein. That until the present action is determined confusion will exist as to the relative rights of carriers and passengers, and, should this action be determined favorably to appellants, innumerable actions for the recovery of overpayments under and pursuant to the rates of fare put in force are likely to result.

(2) The present appeal directly involves the validity of the order of the Interstate Commerce Commission, made on or about November 27, 1920. Said order is based, among other things, upon the theory that a difference between the level of rates maintained for transportation of passengers between points wholly within a state and the level of rates at which passengers are transported in interstate commerce through, into, or out of said state, in and of itself operates as a discrimination against and places a burden upon interstate commerce. If such view be correct, it necessarily follows that Congress has sought to invest the Interstate Commerce Commission with the full, complete, and unified control over transportation in commerce, both interstate and intrastate, and has divested the legislatures and administrative and executive officials of the various states of all effective authority over the matter of passenger transportation in the purely internal commerce of such states.

That, as a matter of common knowledge, some adjustment of the rate structures in intrastate passenger transportation from that established under different economic conditions should probably be made; that, pending the final decision and disposition of the present

appeal, the legislature of Wisconsin, which is now in session, and the legislatures of other states in which controversies are pending, many of which are likewise in session, will be wholly at a loss for guidance as to the extent of the power and authority with which they are respectively possessed, and without guidance to enable them to make such adjustment of their legislative policy with reference to the regulation of their internal commerce; that the legislature of Wisconsin will in the ordinary course of events, have adjourned long prior to a decision of the present action, if the hearing of the same be delayed to await its regular course and order on the docket.

Service of notice of intention of appellants to make this motion has been admitted by the solicitor for the appellee, and is filed herewith.

M. B. OLBRICH,
Solicitor for Appellants.

PLEASE TAKE NOTICE that the foregoing motion will be presented to the Supreme Court of the United States on January 24, 1921 at the opening of court on that day, or as soon thereafter as counsel can be heard.

M. B. OLBRICH,
Solicitor for Appellants.

To:

BRUCE SCOTT,
Solicitor for Appellee.

Due and timely service of the above motion, and notice thereof, is hereby admitted, and without binding itself to any of the allegations thereof, appellee hereby consents that such motion to advance be immediately heard and granted.

BRUCE SCOTT,
Solicitor for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 694—IN EQUITY.

RAILROAD COMMISSION OF WISCONSIN, AND CARL D. JACKSON, H. R. TRUMBOWER AND JOHN S. ALLEN AS MEMBERS OF AND CONSTITUTING THE RAILROAD COMMISSION OF WISCONSIN; JOHN J. BLAINE, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN; FRANK C. MEYER, INDIVIDUALLY AND AS DISTRICT ATTORNEY OF GRANT COUNTY, STATE OF WISCONSIN, *Appellants*,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

MOTION ON BEHALF OF THE STATE OF ALABAMA AND FORTY-ONE OTHER STATES FOR LEAVE TO FILE A BRIEF AND BE HEARD ORALLY, AMICI CURIAE.

The States of Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Montana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsyl-

vania, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming, through their Attorneys General and other state counsel, and their Railroad and Utilities Commissions, respectfully ask leave, as *amici curiae* only, to file a brief, and to be heard orally upon the argument of this case, and make the following statement in support of such motion.

STATEMENT IN SUPPORT OF MOTION.

Issues in This Action.

This action involves the construction and the constitutionality of certain provisions contained in the Transportation Act of 1920, under which the Interstate Commerce Commission has made an order in terms requiring all interstate carriers operating in Wisconsin to advance their intrastate passenger fares above the level permitted by the laws of Wisconsin.

Petitioning States Parties to Actions and Proceedings Involving Like Issues.

The Interstate Commerce Commission, acting under the claimed authority of said provisions of said Act, has made like orders in terms requiring carriers operating in thirteen of the afore-mentioned petitioning states to advance their intrastate fares above the level permitted by the laws of said states, and said Commission is carrying forward proceedings, under orders of investigation made by it, looking towards the making of like orders in nine other of said petitioning states.

The validity of most of the orders so made is already being contested in actions now pending in State

and Federal Courts, to which the petitioning states before mentioned, interested therein, are parties. It is further believed that the Interstate Commerce Commission intends in said proceedings now pending before it to make like orders, and if said orders are made other actions will result.

All of said actions, both those now pending and those that will be hereafter begun, may be brought before this Court for final determination, and the petitioning states believe that the decision which the Court will render in this case, as to the construction and constitutionality of said provisions of the Transportation Act, will be likely to affect the decision which will finally be rendered in the actions aforesaid, now pending and hereafter to be begun.

Rights of Sovereignty Involved.

The petitioning states further say that the rates and fares applicable to purely intrastate commerce in the several states of this Union can lawfully be changed only in the manner provided by the laws and constitutions of the states wherein the same are in force; and said petitioning states desire to appear in this action as *amici curiae* so that they may cite authorities to the Court, and make argument in support of the proposition that the right of each state to regulate its purely internal commerce is a sovereign right, reserved to it under the Constitution of the United States, and not subject to invasion by Congress.

Relaxation of Rule as to Oral Argument.

The petitioning states further say that they are aware of the necessary rule of practice in this Court which ordinarily restricts participation on the part of

amici curiae to the filing of printed briefs, but they respectfully point out that this rule has been relaxed by the Court heretofore in cases of such importance and such character as to render such relaxation reasonable and proper. A single case, decided by the Court at this term, will illustrate the class of cases in which such relaxation is believed to be proper.

The case referred to is that of *Sullican v. Kidd*, decided by this Court January 3, 1921. The issue in that case was the right of an alien, resident in Canada, to inherit real estate situated in the State of Kansas. Under the constitution and laws of Kansas, aliens are incapable of inheriting. One Martin died in Kansas, owning real estate, and leaving surviving relatives, one of whom, Ingoldsby, by name, was resident in Canada. The appellee, Kidd, as devisee of Ingoldsby, claimed title to a share of the real estate.

Said claim of said appellee rested upon the proposition that the treaty between the United States and Great Britain, dated March 2, 1899, provided that subjects of Great Britain, resident in any of her colonies or possessions, should have the right to inherit property in any state in the Union; and that the Federal Constitution, Article VI, providing that: "All treaties * * * shall be the the supreme law of the land * * * anything in the constitution or laws of any state to the contrary notwithstanding;" made said treaty effective to nullify the constitution and laws of Kansas. The following is from the opinion of the court:

> "The case was argued and submitted at the last term of this Court. It was ordered reinstated with notice to the Attorneys General of the United States and of the State of Kansas. The case has been reargued. The Solicitor-General

presented the views of the State Departmet of the United States, and submitted a brief in behalf of the Government."

The petitioning states assume that the Court relaxed the rule in the cited case, as to oral argument by one appearing *amicus curiae,* because it was of the opinion that in a case involving the validity of a state statute or a provision of a state constitution, claimed to be invalid solely by reason of some act of Congress, or some treaty provision made by the Federal Government in the exercise of some power granted to it under the Federal Constitution, the state affected should be afforded opportunity to appear, and point out in argument either that the provision claimed to invalidate its statute or constitution does not purport to do that, properly construed, or that, if it does so purport, the Federal Government in the enactment of the federal statute, or in the making of the treaty, went beyond the power granted to it in the Federal Constitution.

Conclusion.

The orders of the Interstate Commerce Commission, hereinbefore referred to, in each case embrace, with minor unimportant exceptions, all the intrastate rates in the states affected, applicable to the class of traffic covered by the order. It is provided in Section 15 (a) of the Interstate Commerce Act, as amended by the Transportation Act, that orders of the Commission "shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction." Each of said orders specifically pro-

vides that it shall "continue in force until the further order of the Commission."

It will accordingly be seen that by these orders the power of the states to regulate their internal commerce is sought to be taken from them by a department of the Federal Government. This power, the petitioning states say, is a sovereign power reserved to them absolutely by the Federal Constitution, subject only to the provision that in the exercise of it they shall not injure that commerce which is under the protection of the Federal Government. They further point out that the continued free exercise of this power by them is of the most vital importance as affecting the comfort, health and safety of their peoples.

Respectfully submitted,

W. J. Galbraith, Attorney General of Arizona,
J. S. Utley, Attorney General of Arkansas,
James E. Calkins, Counsel, Florida,
R. A. Denny, Attorney General of Georgia,
James K. Hines, Special Counsel, Georgia,
Edward J. Brundage, Attorney General of Illinois,
James H. Wilkerson, Assistant Attorney General, of Illinois,
Morton T. Culver, Assistant Attorney General of Illinois,
Ben J. Gibson, Attorney General of Iowa,
J. H. Henderson, Commerce Counsel, Iowa,
U. S. Lesh, Attorney General of Indiana,
A. B. Cronk, Counsel, Indiana,
A. E. Helm, Commerce Counsel, Topeka, Kans.
R. J. Hopkins, Attorney General of Kansas,
W. M. Barrow, Assistant Attorney General of Louisiana,
Merlin Wiley, Attorney General of Michigan,
Jesse W. Barrett, Attorney General of Missouri,
Wellington K. Rakin, Attorney General of Montana,
E. G. Toomey, Counsel, Montana,
Hugh LaMaster, Assistant Attorney General of Nebraska,
Leonard B. Fowler, Attorney General of Nevada,
Charles D. Newton, Attorney General of New York,
Edward G. Griffin, Deputy Attorney General of New York,
George L. Meade, Deputy Attorney General of New York,
James S. Manning, Attorney General of North Carolina,
William Lemke, Attorney General of North Dakota,
John G. Price, Attorney General of Ohio,
E. E. Corn, Counsel, Ohio,
Samuel M. Wolfe, Attorney General of South Carolina,
O. E. Sweet, Assistant Attorney General of South Dakota,
C. M. Cureton, Attorney General of Texas,
Harvey H. Cluff, Attorney General of Utah,
Of Counsel.

For the Railroad and Utilities Commissions of Forty-two States,

John E. Benton,
General Solicitor National Association of Railway and Utilities Commissioners, 724 Eighteenth St., N. W., Washington, D. C.

CERTIFICATE OF SERVICE OF NOTICE.

I, John E. Benton, one of counsel for the states enumerated in the above motion, hereby certify that on the 26th day of February, 1921, on behalf of said states, I caused to be delivered at the address in Washington, D. C., of Hon. M. B. Olbrich, counsel for the appellants, and of Hon. A. P. Thom, counsel for the appellee, properly addressed respectively, notices in form as follows:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 694—IN EQUITY.

RAILROAD COMMISSION OF WISCONSIN, AND CARL D. JACKSON, H. R. TRUMBOWER, AND JOHN S. ALLEN, AS MEMBERS OF AND CONSTITUTING THE RAILROAD COMMISSION OF WISCONSIN; JOHN J. BLAINE, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN; FRANK C. MEYER, INDIVIDUALLY AND AS DISTRICT ATTORNEY OF GRANT COUNTY, STATE OF WISCONSIN, *Appellants*,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

NOTICE OF MOTION.

In the above entitled proceeding the parties will take notice that on February 28, 1921, upon the coming in of the Court, on behalf of forty-three states, acting through their Attorneys General and other state counsel, and their Railroad and Public Utilities Commissions, I shall ask that leave be granted said states to appear *amici curiae* in said proceeding by brief and oral argument.

Dated at Washington, D. C., February 26, 1921.

JOHN E. BENTON.

NOV 21 1921
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 206

RAILROAD COMMISSION OF WISCONSIN, ET AL.,
Appellants,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.,
Appellees.

MOTION ON BEHALF OF THE STATE OF ALABAMA AND FORTY-ONE OTHER STATES FOR LEAVE TO FILE A BRIEF AND BE HEARD ORALLY, *AMICI CURIAE*.

JOHN E. BENTON,
Attorney,
724 18th St., N. W.,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 694.

RAILROAD COMMISSION OF WISCONSIN, ET AL.,

Appellants,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.,

Appellee.

MOTION ON BEHALF OF THE STATE OF ALABAMA AND FORTY-ONE OTHER STATES FOR LEAVE TO FILE A BRIEF AND BE HEARD ORALLY, *AMICI CURIAE.*

The States of Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Montana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire,

New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming, through their Attorneys General and other state counsel, and their Railroad and Utilities Commissions, respectfully represent:

1. That on February 28, 1921, they filed a motion herein asking leave, as *amici curiae*, only, to file a brief, and to be heard orally upon the argument of this case, and that said motion was granted, and that they duly filed a brief, and participated in oral argument, *amici curiae*.

2. That the court having ordered a reargument herein, said states, for the reasons set forth in said former motion, do now respectfully ask leave to file a further brief, and to be heard orally upon said reargument, *amici curiae*, only.

For the Petitioners,

JOHN E. BENTON,
Attorney,
724 18th St., N. W.,
Washington, D. C.

CERTIFICATE OF NOTICE.

I, John E. Benton, one of counsel for the states enumerated in the above motion, hereby certify that on the 18th day of November, 1921, on behalf of said states, I gave notice of said motion to Hon. M. B. Olbrich, Counsel for the Appellants, and to Hon. A. P. Thom and Bruce Scott, Esq., Counsel for the Appellee, by sending, postage prepaid to each of them, a copy of said motion, with notice that the same would be presented upon the coming in of this court on November 21, 1921. A copy of said notice has been filed with the Clerk.

Dated: November 21, 1921.

JOHN E. BENTON.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1920

No. 694

RAILROAD COMMISSION OF WISCONSIN, and CARL D. JACKSON, H. R. TRUMBOWER and JOHN S. ALLEN, as members of and constituting the Railroad Commission of Wisconsin; JOHN J. BLAINE, individually and as Attorney General of the State of Wisconsin; FRANK C. MEYER, individually and as District Attorney of Grant County, State of Wisconsin, *Appellants,* v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Appellee.*	In Equity

Appeal from the District Court of the United States for the Eastern District of Wisconsin

SUPPLEMENTAL BRIEF OF APPELLANTS

STATEMENT OF CASE

In addition to the history and development of the Transportation Act itself account must be taken by

the Court of an amendment to Section 10 of the Federal Control Act which passed both Houses of Congress so nearly contemporary with the consideration of the Transportation Act as to make it of decisive significance. The rule which permits resort to statutes *in pari materia* or even statutes upon cognate subjects is too firmly settled to require citations of authority.

At pp. 89 to 93 of the brief submitted for the Association of Utility Commissioners mention is made of these Congressional proceedings. The matter is of such importance, however, that fairness to the court seems to require that the legislative setting should be submitted in greater detail.

As the reports of this Court disclose, on May 5, 1919, the case of *Northern Pacific Railroad Co. v. North Dakota* was argued in this Court, and on June 2, 1919, a decision rendered as elsewhere set forth sustaining in full comprehensive power in the President to fix all rates.

It is unnecessary to discuss the reason for the introduction of a bill to change this rule, but we find under date of May 23, 1919, Senate Bill 641 was introduced.[1] The bill was reported June 4, 1919.[1a] On June 12, 1919, ten days after the decision of this Court, the bill passed the Senate specifically restoring to the Interstate Commerce Commission its full jurisdiction over interstate rates and providing, "That no intrastate rates shall be in-

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[1]Congressional Record, 1st Sess., 66th Cong., Vol. 58, p. 152.

[1a] *Id.*, p. 636.

creased until at least thirty days' notice of the proposed increase has been given to the shippers of the State in which the increase is proposed and a hearing granted." Thereafter, in regular course, the bill went to the House of Representatives. After hearing the Committee on Interstate and Foreign Commerce made a report upon the bill under date of August 13, 1919.[2] The Committee changed the Senate Bill and substituted a provision as to intrastate rates which read:

> "Provided, That no change or increase shall hereafter be made in intrastate rates, fares, charges, classifications, regulations or practices without having first secured the approval of the proper State regulating tribunals conformable to the laws of the several States."

Thereafter, two conferences were held between the Senate and the House, and the conference report of the bill containing the language quoted was agreed to by the House on October 30, 1919,[3] and by the Senate on November 3, 1919.[4] The bill was vetoed by the President on November 19, 1919. His message leaves no doubt of the intention to make a complete restoration of State power:

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[2]66th Cong., 1st Sess., H. R. Report No. 230.
[3]*Id.*, Congressional Record, p. 7767.
[4]*Id.*, p. 7872.

"The practice of the Railroad Administration to secure the advice of the Interstate Commerce Commission upon matters of importance reasonably insures an adequate representation of the public interest and avoids the divided action and inevitable delay which would result if each State authority should have exclusive and final power as to regulation of all matters of intrastate traffic within its borders." * * *

"In the last analysis, while the Federal Government is solely responsible, it seems to me that entirely independent and final power as to a large proportion of these vital matters should not be transferred to the respective States."[5]

The importance of the light which this legislation reflects upon Congressional intent can scarcely be exaggerated. It appears that Congress, working through the same Committees that were giving consideration to the Transportation Act, deemed the restoration of State prerogatives of such importance that it was unwilling to abide by the construction which this Court had put upon the Federal Control Act, even for the brief period of such control remaining. Practically without opposition the exercise of Presidential power was made subject to State approval. Not the least significant thing is the close

[5] *Id.*, p. 8805, Senate Document No. 155.

relation in point of time of the action of Congress upon this bill to its action upon the Transportation Act. On October 30, 1919, the House adopted the declaration that the exercise of Presidential control under the war power should be subject to State regulation. This was ten days prior to the report of the Transportation Act as it passed the House submitted by Mr. Esch. The Senate concurred in this measure for the revival of State power a week prior to Mr. Esch's report. The Transportation Act was first adopted by the House on November 17, 1919, just two weeks after final action by the Senate on the measure under discussion. This action by the House preceded the Presidential veto by two days so that there is no room for the argument that the attitude of that body was changed by the Presidential message, nor was any change made in the Senate version of the Transportation Act following the President's veto.

In the discussion that took place in both Houses prior to the agreement to the conference report which embodied the Transportation Act in its final form, there is no suggestion of any change of attitude as to the matter of a full restoration of State power as the result of such veto message.

Congress having thus manifested its conviction that the revival of State authority was of such importance as to justify a limitation of the all-inclusive war power during the brief period of Federal control remaining, it is incredible that it should contemplate the revival of that power for a month and a

half or three months and a half and thereafter subject it to eclipse again when the more limited and normal power over interstate commerce should be exercised.

WILLIAM J. MORGAN,
Attorney General
of Wisconsin,

RALPH M. HOYT,
Deputy Attorney General
of Wisconsin,

E. E. BROSSARD,
Assistant Attorney General
of Wisconsin.

M. B. OLBRICH,
Special Counsel for the
State of Wisconsin.
Solicitors for Appellants.

FILED
FEB 28 1921
JAMES D. MAHER,
CLERK

Supreme Court of the United States

October Term, 1920.

No. [redacted]206

RAILROAD COMMISSION OF WISCONSIN ET AL., APPELLANTS

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

BRIEF FOR APPELLEE.

ALFRED P. THOM,
Counsel.

BRUCE SCOTT,
KENNETH F. BURGESS,
R. V. FLETCHER,
O. W. DYNES,
Of Counsel.

Washington, D. C., February 28, 1921.

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Supreme Court of the United States

October Term, 1920.

No. 694.

RAILROAD COMMISSION OF WISCONSIN ET AL., APPELLANTS

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

BRIEF FOR APPELLEE.

For detailed statement of the case, see separate brief filed for the Appellee herein.

The questions arising in this case may be presented under the following titles:

1. The Constitutional power of Congress to confer upon the Interstate Commerce Commission the authority over State rates contained in paragraphs (3) and (4) of section 13 of the Interstate Commerce Act (Section 416 of the Transportation Act, 1920).

2. The legal interpretation of paragraphs (3) and (4) of Section 13 of the Interstate Commerce Act.

3. The exercise by the Commission, in this case, of the power conferred upon it by the Act mentioned.

These will be presented in their order.

FIRST.

The Constitutional Power of Congress.

The Constitutional power of Congress to enact this legislation will be considered under three separate clauses of the Constitution, namely:

1. The Commerce Power.
2. The War Power.
3. The Power to Establish Post Offices and Post Roads.

I.

THE COMMERCE POWER.

The Commerce Power, standing alone, is adequate to support the regulation by Congress, contained in paragraphs (3) *and* (4) *of Section* 13 *of the Interstate Commerce Act, of the State rates of carriers engaged in interstate commerce.*

The principles relating to the power of Congress under the commerce clause of the Constitution,

have been so often considered by this Court, and are so familiar and so well established, that it would hardly seem appropriate to enter upon any extended discussion of the question, were it not for the fact that the power as related to this case will, as we understand, be assailed by counsel for several of the States.

When the history of the adoption of this clause of the Constitution is recalled, and the causes leading to it are remembered, it is difficult to understand how it can be objected to by any State.

In view, however, of the attitude of some of the States, as expressed in this record, it is of peculiar interest at this time, in considering the causes which brought the Federal Constitution into existence, to study the influence which the desire of the States for a uniform regulation of commerce had upon its adoption and upon its character.

When the War of the Revolution ended and Independence was an accomplished fact, each State possessed a sovereignty which was practically unlimited over its foreign commerce, and its commerce with other States.

> "Congress had no power to regulate commerce, but each State, left to itself, ordered its own trade in its own way; and the way of one State was always different from the way of another. The commerce which Massachusetts found it to her interest to encourage, Virginia found it to hers to restrict. New York would not protect the trade in indigo and pitch. South Carolina cared

nothing for the success of the fur interests. New England derived great revenues from lumber, oil and potatoes; Pennsylvania from corn and grain, and were in no wise concerned as to the prosperity of the trade of their neighbors. Articles which Connecticut and New Jersey excluded from their ports by heavy tonnage duties, entered New York with scarcely any charges other than light money."

McMaster's History of the American People, Vol. I, p. 206.

Between many of the States, thus divided in interest and policy, there was a race of greed and selfishness for commercial advantage and supremacy.

Each State possessed the power of imposing export taxes, and could thus keep its products at home, excluding them from the use and enjoyment of the people of the other States; and of imposing import duties, and could thus exclude the people of other States from its markets. Each State retained complete control over its own ports; and thus, by its commercial policy, could, through the competition of ports, regulate or break down the commercial policy of another State in regard to its own ports and in regard to its own commerce.

These powers were large enough, not only to create state rivalries and state enmities, but to elevate the states of greatest commercial power into complete commercial, and finally into com-

plete political, ascendency over their weaker sister states.

Nor were these powers merely theoretical. They were brought into active and oppressive operation. They were made the means of commercial war by one state upon another.

For example:

Virginia, by her export duties and inspection laws, with the incidental tax, sought to keep her tobacco at home.

Maryland, by her inspection laws and taxes, sought to do the same with regard to her potash and pearl-ash.

Massachusetts prohibited the exportation of grain and of unmanufactured calfskins, and imposed an onerous inspection tax on exports to other states of tobacco, butter and other products; while North Carolina for a limited time laid an embargo on the exportation to other states of corn, wheat, flour, beef, bacon and other necessaries of life.

Turning to imports:

New York, by imposing an import duty, sought to exclude from its markets the butter, milk, and other dairy products of New Jersey and the firewood of Connecticut.

Rhode Island imposed an ad valorem tax of five per cent on all articles imported into that state from the other states as well as from foreign countries, with a proviso for reciprocal relief.

And so with other states.

In regard to the commercial rivalry and war of

ports, it was customary for states having available ports to impose an unlimited tax on all goods reaching this continent through their ports, and thus subjecting, for the benefit of themselves, the people of the other states to a substantial burden of taxation.

For example, the ports of Boston and New York were at one time far behind Newport in the value of their imports, and Rhode Island, according to the Supreme Court of the United States, paid all the expenses of her government by duties on goods landed at her principal ports.

The condition at that time of commercial selfishness and greed between the states is thus described by Fiske in his work on the "Critical Period of American History, 1783-1789," at page 144:

> "Meanwhile, the different states, with their different tariff and tonnage acts, began to make commercial war upon one another. No sooner had the other three New England States virtually closed their ports to British shipping, than Connecticut threw hers wide open, an act which she followed by laying duties upon imports from Massachusetts.
>
> "Pennsylvania discriminated against Delaware; and New Jersey, pillaged at once **by both her greater neighbors**, was compared to a cask tapped at both ends. The conduct of New York became especially selfish and blameworthy. That rapid growth which was soon to carry the city and state to a position of primacy in the Union had already begun. After the departure of

the British the revival of business went on with leaps and bounds. The feeling of local patriotism waxed strong, and in no one was it more completely manifested than in George Clinton, the Revolutionary general, whom the people elected Governor for nine successive terms. * * * * It was his first article of faith that New York must be the greatest state in the Union. But his conception of statesmanship was extremely narrow. In his mind, the welfare of New York meant the pulling down and thrusting aside of all her neighbors and rivals. * * * * Under his guidance, the history of New York, during the five years following the peace of 1783, was a shameful story of greedy monopoly and sectional hate. Of all the thirteen states none behaved worse except Rhode Island.

"A single instance, which occurred early in 1787, may serve as an illustration. The City of New York, with its population of thirty thousand souls, had long been supplied with firewood from Connecticut, and with butter and cheese, chickens and garden vegetables, from the thrifty farms of New Jersey. This trade, it was observed, carried thousands of dollars out of the city and into the pockets of detested Yankees and despised Jerseymen. It was ruinous to domestic industry, said the men of New York. It must be stopped by those effective remedies of the Sangrado school of economic doctors, a navigation act and a protective tariff.

"Acts were accordingly passed obliging every Yankee sloop which came down through Hell Gate, and every Jersey mar-

ket boat which was rowed across from Paulus Hook to Cortlandt street, to pay entrance fees and obtain clearances at the custom-house, just as was done by ships from London or Hamburg; and not a cartload of Connecticut firewood could be delivered at the back door of a country house in Beeckman street until it should have paid a heavy duty. Great and just was the wrath of the farmers and lumbermen. The New Jersey legislature made up its mind to retaliate. * * * * Connecticut was equally prompt. At a great meeting of business men, held at New London, it was unanimously agreed to suspend all commercial intercourse with New York. Every merchant signed an agreement, under penalty of two hundred and fifty dollars for the first offense, not to send any goods whatever into the hated state for a period of twelve months. By such retaliatory measures, it was hoped that New York might be compelled to rescind her odious enactment. But such meetings and such resolves bore an ominous likeness to the meetings and resolves which in the years before 1775 had heralded a state of war; and but for the good work done by the Federal Convention another five years would scarcely have elapsed before shots would have been fired and seeds of perennial hatred sown on the shores that looked toward Manhattan Island."

But these discriminations and exactions of one state against the trade of another, and the rivalry in trade which threatened the commercial destruc-

tion of some states and the undue elevation, prosperity and dominance of others, were not the only reasons for the insistent demand which preceded and finally controlled the Constitutional Convention of 1787 in regard to the establishment of a system of just and equitable regulation of commerce between the states by an authority fairly representing them all.

The question of commercial regulation, in addition to its relationship to the trade between the existing states, possessed also a most important and commanding political aspect. The development of the West was then progressing with great rapidity, and that region was spoken of by George Washington as a "rising world," signifying particularly, in the minds of the statesmen of that day, the territory now constituting the states of Tennessee and Kentucky, and the states afterwards carved out of the territory northwest of the Ohio and East of the Mississippi rivers. The future political affiliation of this large and important territory was a question of prime and of vast importance to the then existing states. Great Britain was on the northern boundary with its Dominion of Canada, and Spain on the South commanded the mouth, and hence commanded the navigation, of the Mississippi River. The course of trade is determined by the inducements that are offered and the facilities it can command, and political relationships are strongly influenced by commercial ties and interests. It was, therefore, one of the most important problems of that day to

bind this great and developing western country to the eastern states by ties of intimate commercial intercourse. This could not be done if the eastern states could enrich themselves by imposts upon the commerce paid for by the people of the West, or by excluding the competitive products of the West from the eastern markets.

Great Britain or Spain, close neighbors on the North and South, could easily outbid such a policy of narrowness and selfishness as the people of the West saw already in operation in many of the most important eastern states, and it was apparent that whether or not such a policy should be adopted, could not be safely left to the individual states.

George Washington, in speaking of the future political affiliations of these pioneer western people, said:

> "If we cannot bind these people to us by interest, and it is not otherwise to be effected but by a commercial knot, we shall be no more to them after a while than Great Britain or Spain, and they may be as closely linked with one of those powers as we wish them to be with us, and, in that event, they may be a severe thorn in our side."

It thus became necessary, not only as a matter of sound economics but also as a matter of wise and broad politics, to find a way of fairly regulating commerce in the interest of all, free from the narrowness and selfishness of the individual states.

The only way of remedying these commercial evils, which were flagrant and were universally recognized, and of meeting the political exigencies of the situation, was, according to the practically universal belief of the day, to exclude the states from the power to regulate commerce among the states and with foreign nations, and to confer that power without reservation upon a central authority which should fairly and equitably represent them all.

The public consciousness on this subject was, prior to the Constitutional Convention, indicated in a great variety of ways and from a great variety of sources.

Alexander Hamilton declared for a central government with "complete sovereignty over all that relates to war, peace, trade and finance."

James Monroe, as Chairman of a Committee of the Congress under the Federation, in 1785, submitted a report declaring that:

> "The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article, * * * * and of regulating the trade of the states, as well with foreign nations as with each other."

James Madison moved in the General Assembly of Virginia a resolution for a convention of delegates of all the states "to take into consideration the trade of the United States; to examine the re-

lative situation and trade of the said states; to consider how far a uniform system in their commercial regulations be necessary to their common interest and permanent harmony."

There were similar expressions of view in the legislatures of Rhode Island, Connecticut and New Jersey, in the resolutions of town meetings, and in reports of committees of Congress under the Federation.

The Madison resolution resulted in the assembling of the Annapolis Convention in 1786 and in a recommendation by the delegates, there assembled *to consider the regulation of commerce,* that Congress should call a general convention of all the states to meet in Philadelphia on the second Monday in May, 1787, "to devise such further provisions as shall appear to be necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union."

The Convention thus called was the Convention which framed the Constitution, and the declaration of the Supreme Court of the United States in the case of *Cook vs Pennsylvania,* 97 U. S., 566, is amply justified, to the effect that:

> "A careful reader of the history of the times which immediately preceded the assembling of the convention which framed the American Constitution cannot fail to discover that the need of some equitable and just regulation of commerce was among the most influential causes which led to its meeting."

The result of its deliberations on the four large subjects of national concern enumerated by Alexander Hamilton—which are the four fundamental essentials of national existence and efficiency—and as to which he declared that the Federal Government should possess complete sovereignty, namely, the purse, war, peace, and commerce, is exhibited in the following clauses of the Constitution:

> "The Congress shall have power:
> "To lay and collect taxes, duties, imposts and excises, to pay debts and provide for the common defense and general welfare.
> * * * *
> "To borrow money on the credit of the United States.
> "To regulate commerce with foreign nations and among the several states, and with the Indian tribes.
> "To declare war. * * * *
> "To raise and support armies.
> "To provide and maintain a navy."

By entering into the compact of the Constitution, each state *acquired the right* to have these essential functions and duties performed by the Federal Government established by the Constitution as representing all the states. In entering into the compact the state *reserved* some rights which it did not grant, and it also acquired some rights which it did not have. The rights acquired are not less state rights and are not less important or less sacred than those reserved.

The acquired rights of the states included the

right to avail themselves, separately and individually, of the protection guaranteed to them and their people against foreign or domestic invasion.

The states acquired the right that the Federal Government should bear the expense of raising and supporting armies, and of providing and maintaining navies.

They acquired the right to be protected against the narrowness and greed of sister states in the matter of duties, imposts and excises, and to have established a national monetary system.

They each likewise acquired the right, as to the trade in which it and other states were interested, of being protected by an authority representing them all in equality of opportunity and against the oppression and selfishness of other states.

All of these rights have grown in importance as civilization has developed, and as intercourse between the states and between nations has become more rapid, easier and more necessary. As to none of these rights is this truer than in respect of the right of the states to have the commerce in which all are interested regulated by an authority which represents them all.

Since the adoption of the Constitution commerce has assumed far greater consequence in the affairs and destinies of men and of nations, than it had in those earlier days. Steam and electricity have come with their mighty influence, and have brought all the states and all the nations into close and intimate commercial relationship.

Men no longer deal in trade most largely with

their immediate neighbors, but find it essential to their success to have free and unimpeded and adequate access to the markets of the world.

The interests of the producing states—particularly the states of the South and the West, where there are no markets of the first importance—imperatively require easy and quick transportation to the world's great market cities, such as New York, Philadelphia, Boston, and Chicago in this country, and Liverpool, London and Paris abroad.

It may be safely stated that at least eighty-five per cent of the trade of the various states moves in interstate and foreign commerce. It traverses vast distances; it must pay low mileage rates to reach and to compete in distant markets; it cannot, because of the value of time and the small margins of profit, permit frequent handlings or breakings of bulk.

To meet these economic conditions—to satisfy the essential needs and to accommodate the movement of this great traffic—it has become necessary to create long and continuous lines of railroad in the place of the short and disconnected lines which were once adequate to the requirements of trade. These large systems of railroad, which have come into being in obedience to the economic law which demands continuous, rapid and unbroken transportation, necessarily extend across many states.

Congress, recognizing this economic development, has provided in the Transportation Act for the consolidation of the carriers into great systems. (Sec. 407, Paragraph 4.)

The problem of greatest magnitude which concerns the people of all the states in regard to these carriers, is how their continuity of service shall be preserved unobstructed, and what shall be the quality, adequacy and efficiency which their transportation facilities shall possess.

Each state, being dependent for its prosperity upon the producing capacity of its people, which, in turn, is dependent upon the adequacy of the means of reaching the markets of the world, is deeply concerned that the transportation capacity of the carriers which serve it shall be adequate, and shall not be crippled or impaired.

A broad and wise policy in dealing with the instrumentalities of commerce is, therefore, a matter of supreme interest to all the states. A narrow or niggardly or selfish policy, if adopted by any one of the states through which a railroad passes, may seriously cripple and depress the commerce of every other state which the railroad serves.

No adequate conception of the transportation problem, as it affects the development of the country and the growth of its commerce, can ignore the necessity that transportation facilities must be all the time growing and improving to keep pace with the growth and expansion of commerce—otherwise there can be no growth or expansion of commerce.

Such growth in transportation facilities involves a constant input of new capital, and new capital can only be attracted by credit. While no one,

state through which a railroad passes can alone establish a railroad company's credit, a single state can impair or destroy it.

If a railroad runs through and serves eleven states, ten of them may be guided by broad and liberal views, and may be controlled by the policy of encouraging the establishment and maintenance of adequate transportation facilities, and may not only be willing, but may desire that the transportation charges shall be adequate to establish in the public interest adequate credit for the carrier. The eleventh may, however, have no adequate commercial outlook, and may be unwilling that its state traffic shall contribute anything to the liberal programme of the other ten, which would build for the future and insure the present and continuing adequacy of the transportation facilities on which all are equally dependent.

In such a case, what shall be done? Shall the ten states bow to the will or caprice of the one and allow it to control? Shall they permit the narrow view of the one state to limit the standard or the character or the quality of the transportation facilities which their people shall enjoy? If so, then the one state controls not only its own commerce, but the commerce of the others, for it limits by its restrictive policy the transportation facilities which make possible the commerce of the other states.

If, on the other hand, the standard of facilities is not brought down to this low level, and is to be made adequate to the needs of all, then, if the ob-

jecting state can avail itself, on its own terms (short of confiscation), of the facilities common to them all, then the commerce of the other ten states, or interstate commerce, or both, must bear the burden which the dissenting state has refused to share, of building up and maintaining adequate transportation facilities for them all.

In either case the dissenting state, in a very effective way, regulates the interstate and foreign commerce and business opportunities of all. It either determines the standard of the commercial facilities, and, therefore, the commercial opportunities, of the other states, or it throws on them an unfair and undue proportion of the burden of sustaining them at a level of higher efficiency.

Is it not the right of each of these states, thus oppressed by the narrow and selfish policy of one —a right acquired under the compact of the Constitution—to have its facilities for interstate and foreign commerce (in case Congress, representing all the states, shall deem it just and wise) freed from these state restrictions and regulated by an authority representing all of them?

No more striking illustration can be imagined of the fundamental differences in policy, between the states, in respect to the standard of transportation facilities, than is furnished by the case at bar. Here we find more than thirty states agreeing with the national policy of maintaining adequate transportation facilities, and readily adjusting the charges upon the state traffic of their respective states to the level fixed by the national authority,

while a few other states are here objecting to, and declining to participate in sustaining, the policy thus approved by the national Government and by the Government of a large majority of the states themselves.

What is to be done? Shall the views of the national Government and of the states which agree with its policy prevail, or shall the views of the dissenting states become the dominant regulation of commerce?

If the latter, Congress would be denied the exercise of its constitutional authority, and the state, not the nation, would be supreme within the national field.

> *Houston & Texas Railway v. United States,* 234 U. S. 352.
> *American Express Company v. Caldwell,* 244 U. S. 624.
> *Illinois Central Railroad Company v. Public Utilities Commission,* 245 U. S. 506.

The proposition here stated that the national standard as to the adequacy and efficiency of the instrumentalities of interstate commerce can not be surrendered to the states' judgment without an abdication in favor of the states to regulate interstate commerce, is sustained in principle in the case of *Houston & Texas Railway vs. United States,* 234 U. S. 355, where the court says:

> "It is also clear that, in removing the injurious discrimination against interstate traffic arising from the relation of intrastate

to interstate rates, the Congress is not bound to reduce the latter below what it may deem to be a proper standard, fair to the carrier and to the public. Otherwise it would prevent injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the movement of interstate traffic over their lines in accordance with the terms it establishes."

From the case just cited we make the following additional quotation from page 350:

> "It is unnecessary to repeat what has frequently been said by this Court with respect to the complete and paramount character of the power conferred on Congress to regulate commerce among the several states. It is the essence of this power that where it exists it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local government. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation, and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.' By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise, and to protect the national interest by securing the freedom of interstate commercial intercourse from local control."

From page 351:

> "The fact that the carriers are instrumentalities of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carrier from being made a means of injury to that which had been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field."

The law of this line of cases is thus summarized by the Court in the case of the *Illinois Central Railroad Company vs. the Public Utilities Commission*, 245 U. S. 506.

> "1. Under the commerce clause of the Constitution Congress has ample power to prevent the common instrumentalities of interstate and intrastate commerce, such as the railroads, from being used in their intrastate operations in such manner as to affect injuriously traffic which is interstate.
>
> "2. Where unjust discrimination against interstate commerce arises out of the relation of intrastate to interstate rates this power may be exerted to remove the dis-

crimination, and this whether the intrastate rates are maintained under a local statute or by the voluntary act of the carrier.

"'3. In correcting such discrimination Congress is not restricted to an adjustment or reduction of the interstate rates, but may prescribe a reasonable standard to which they shall conform and require the carrier to adjust the intrastate rates in such way as to remove the discrimination; for where the interstate and intrastate transactions of carriers are so related that the effective regulation of one involves control of the other, it is Congress, and not the state, that is entitled to prescribe the dominant rule.

"4. It is admissible for Congress to provide for the execution of this power through a subordinate body such as the Interstate Commerce Commission, and this it has done by the Act to Regulate Commerce.

"5. Where in the exercise of its delegated authority the Commission not only finds that a disparity in the two classes of rates is resulting in unjust discrimination against interstate commerce but also determines what are reasonable rates for the interstate traffic, and then directs the removal of the discrimination, the carrier not only is entitled to put in force the interstate rates found reasonable but is free to remove the forbidden discrimination by bringing the intrastate rates to the same level."

In *American Express Co. vs. Caldwell*, 244 U. S., 617, this Court made the following significant comment, at page 625:

> "That Court (the Supreme Court of South Dakota) denies not only the intent of Congress to confer upon the Commission authority to remove an existing discrimination against interstate commerce by directing a change of an intrastate rate prescribed by state authority; but denies also the power of Congress under the Constitution to confer such power upon the Commission or to exercise it directly. The existence of such power and authority should not have been questioned since the decision of this Court in the Shreveport case."

The argument is essentially unsound which concedes to the national government the power to regulate interstate rates, which are merely the terms on which interstate commerce is conducted, and denies to it the power to regulate the standard and efficiency of the instrument of interstate commerce, which constitutes the essential condition of the very existence of interstate commerce itself—for the constitutional power of regulation is "to foster and protect," as well as "to control and restrain."

Houston & Texas Ry. v. United States, 234 U. S. 351.

The argument is likewise essentially unsound which concedes to the national government the power to declare and remove a discrimination of a single rate made by a state against a competitive interstate rate, but denies to it the power to de-

clare and remove a discrimination created by a body of state rates against the entire structure of interstate commerce, for that would amount to the concession of a power to protect a detail of interstate commerce and a denial of the power to protect and preserve interstate commerce itself. Under such an argument the value of the detail would disappear in the destruction or impairment of the whole, of which the detail is only a part.

In fact, as has been plainly stated by this Court,

> "Congress, which alone exercises the legislative power of the Government, is the constitutional protector of foreign and interstate commerce."
>
> *Louisville Bridge Company v. United States*, 242 U. S. 417;
> *Bridge Company v. United States*, 105 U. S. 480.

This power can not in reason be confined to the regulation only of details, but must extend to and include the whole structure of interstate commerce.

The following propositions, as to the extent of the power of Congress under the commerce clause, are established beyond the reach of successful controversy by the decisions of this Court:

1. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority in Con-

gress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce.

California v. Pacific RR. Co., 127 U. S. 39.

2. The lawful power to create the corporation and give it the attributes deemed essential cannot be rendered unavailing by detaching particular powers and thus destroy the efficacy of the corporation as a national instrument. Although a particular character of business might not when considered by itself be within the implied power of Congress, if such business is appropriate and relevant to the business of the corporation, the implied power is to be tested by the right to create the corporation and to attach to it that which is relevant, in the judgment of Congress, to make the business of the corporation successful.

First National Bank v. Union Trust Co., 244 U. S. 420;

McCulloch v. Maryland, 4 Wheat, 316;

Osborn v. Bank, 9 Wheat, 738.

3. The entire instrumentality of interstate commerce is within the regulating power of Congress and when exercised the regulation is controlling and exclusive.

Minnesota Rate Cases, 230 U. S. 399, 411.

Houston & Texas Ry. Co. v. United States, 234 U. S. 351.

"The power to regulate is one to control

the means by which commerce is carried on."
Hammer v. Dagenhart, 247 U. S. 269.

Under these principles the Government itself might construct a transportation system, or acquire one already constructed, or might exercise through private individuals of private corporations its power of providing for commerce.

Whether owning and operating the instrumentality itself, or performing the function through private individuals or private corporations, it is competent for the Government to authorize the instrumentality of interstate commerce to engage in state commerce, and, under its power to regulate the instrumentality, to regulate all its activities and interests, so far as the public interest may require, including, if it so elect, the regulation as an original matter of the state rates of such interstate carriers.

No one would question the power of the Government, if it owned and operated the instrumentality itself, to regulate all the rates of its instrumentality, state as well as interstate. The power to do this can not be more restricted and can not be less comprehensive, if Congress elects to perform its duty of regulation through private individuals or private corporations.

An important memorandum on the subject of the powers of Congress in respect to interstate and foreign commerce, was prepared in November, 1916—not long before his death—by Honorable

Richard Olney, Attorney General and Secretary of State in Mr. Cleveland's Cabinet, and justly renowned as an eminent authority on constitutional law. A part of it is pertinent here, and is respectfully presented for the consideration of the Court:

> "1. For all the purposes and functions of commerce between the states of the United States, between such states and territories of the United States, and between such states and territories on the one hand and foreign nations on the other, the United States is one country, with complete and exclusive jurisdiction over the whole subject—and state lines and jurisdictions are without significance.
>
> "2. Commerce, in the constitutional sense, covers transportation and intercourse in all forms and whether existing when the constitution was adopted or since introduced and practiced.
>
> "3. The national commerce power, being of such extent and exclusiveness, necessarily subjects to national regulation and control all the agencies and instrumentalities by which national commerce is carried on.
>
> "4. It cannot be doubted that a railroad corporation created by a national charter is an apt instrument for the carrying on of national transportation and that the organization of such a corporation with all appropriate powers and duties is a fit subject for treatment under the commerce power.
>
> "5. Nor is it to be doubted—because ample experience has shown—that, in this matter of national transportation by railroads,

public policy and the public welfare are at one with the law of the country. They imperatively require that the subject should be dealt with in all its phases by a single authority which can be no other than the nation itself. The mixed jurisdiction over the subject now prevailing—the states exercising a part mostly through state charters and the United States a part mostly through the commerce power—is thoroughly archaic, originated before the true scope of the commerce power was generally understood, and has resulted in a serious waste and inefficiency in railroad operation which is at once matter of public notoriety and public scandal.

"6. In view of the settled law of the land as respects the national commerce power—as by virtue of it the United States practically undertakes to exercise the power for the benefit of the several states and of all the people—and as transportation by railroad is within that power and is today in a condition most unsatisfactory to the private owners of railroads as well as seriously prejudicial to the national interests—the question is of the remedy for that condition."

II.

THE WAR POWER.

The War Power, standing alone, is adequate to sustain the validity of the power exercised by Congress with reference to the state rates of carriers engaged in interstate commerce, by paragraphs (3) *and* (4) *of Section* 13 *of the Interstate Commerce Act.*

This Court has held, in the case of *Northern Pacific Railway Company v. North Dakota*, 250 U. S. 135, that the war power of Congress extends to the regulation of intrastate rates.

The only question is as to when and under what circumstances the war power may be exercised. There can be no controversy as to its extent in the matters here involved.

The power in the case just referred to was exercised during a state of actual hostilities.

But the war power does not exist only during war.

That it includes the power to guard against a renewal of a conflict and to remedy evils arising from its rise and progress appears from the case of

Hamilton v. Kentucky Distilleries, 251 U. S. 146.

It likewise, in order to be adequate, must extend to all reasonable measures of preparation. The one great lesson of the European War is the necessity for preparation as a means of successful war.

From 1914 to 1918, one nation—supplemented, it is true, by the cooperation of a few minor nations—one nation of some 70 millions of population, stood out against the combined power of other European nations, vastly superior in resources and in population, and waged a war which from its beginning almost to its end threatened the world with the armed domination of Germany. This happened because of Germany's preparation for war—because, prior to the beginning of actual hostilities, it was organized in all its industrial, economic and military relationships to throw at once its whole force into war, and, among other means of preparation, it had designed, constructed and maintained its facilities of transportation in such way as to be available for the immediate transportation of its armies to its frontiers and the immediate and effective mobilization of all its national resources.

The history of this war—its long continuance, its threatened outcome, the necessity for United States and other nations to throw their armies and navies and all their resources into the conflict,—has taught the lesson to the world that preparation in advance is essential to national safety and must not only be included in the war power, but must be exercised to the extent, at least, of creating and establishing the fundamentals of national organization and of making available within a reasonable time the national resources.

Thus there can be no doubt that the war power

includes the power of reasonable preparation and organization for purposes of national defense.

It is proper, therefore, to inquire whether the "fostering and preservation in full vigor of rail and water transportation" is a reasonable means of preparation and organization in times of peace for the efficient performance of the war duty and the effective exercise of the war power, and whether it is so closely related to the exercise of the power as to come within its scope.

It has been treated so both by Congress and the President.

In the Joint Resolution declaring the existence of a state of war between the Imperial German Government and the Government and people of the United States, Congress provided as follows:

> "That the President be, and he is hereby, authorized and directed to employ the entire Naval and Military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States."

This was on April 6, 1917.

Prior to this time, namely, on the 29th of August, 1916, Congress had expressed its view, as to the appropriate means of carrying on war, by empowering

> "The President, in time of war, through

> the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Army Appropriation Bill, August 29, 1916.

By proclamation dated December 26, 1917, the President, pursuant to this authorization, did take possession of the railroads and other systems of transportation for war purposes, and Congress in the Federal Control Act, approved March 21, 1918, authorized this control to continue throughout the war and for a reasonable time thereafter not exceeding 21 months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace.

It is manifest, not only from the inherent importance of transportation to the effective conduct of war, but from these official acts of the Congress and of the President, that an efficient system of transportation has a direct and essential relationship to the successful exercise of the war power.

Of course, the mobilization and coordination of all industry are also important, but agriculture, manufacture and even mining may be legitimately considered as further removed from the conduct of war and their control not so reasonably and closely related to the exercise of the power as to justify

treating them, by way of preparation, as, in the discretion of Congress, the existence and adequacy of the means of transportation may be treated.

No one will deny that, if there were no railroads, Congress might constitutionally provide, under the war power for the construction of them by the Government itself. It need not leave the nation defenceless and unable to coordinate and concentrate its resources from the mines, forests, factories and farms, at the point needed to repel invasion or to wage an aggressive campaign of national defense.

It is not by the Constitution confined to the direct construction of these essential means of successful war. It may authorize such construction by private corporations or individuals or it may avail itself of those already in existence.

> *Cherokee Nation v. Kansas Ry. Co.* 135 U. S. 641.
> *California v. Central Pacific Ry. Co.*, 127 U. S. 1.

In fact, in the language of Justice Brandeis, "to Congress in the exercise of its powers, not least the war power on which the very life of the nation depends, a wide latitude of discretion must be accorded."

> *Hamilton v. Kentucky Distilleries*, 251 U. S. 163.

In the exercise of this discretion, Congress may reasonably determine that it would be an unwise and unnecessary expenditure, and would constitute economic waste, to duplicate at the national expense the existing systems of transportation and that the public interest would be better served by "fostering and preserving" them "in full vigor."

This in section 500 of the Transportation Act, 1920, is expressly declared to be the policy of Congress and important functions in connection with the promotion, encouragement and development of inland water transportation are devolved upon the Secretary of War.

The view that this national policy need not be undertaken under the condition and limitation of placing the entire burden on one class of the traffic of these carriers, and that the cost may be equitably distributed by national authority so as to include both their state and interstate traffic, is presented and elaborated in a subsequent part of this brief.

We accordingly submit that the following propositions cannot be successfully questioned:

1. That the War Power of Congress under the Constitution is not confined, in its exercise, to an actual state of war or to dealing with the consequences of actual war, but also includes all measures of proper, reasonable and adequate preparation for war.
2. That the existence of an adequate and competent system of transportation,

both rail and water, reaching and making available the national resources for supplying and provisioning armies and navies, and transporting troops and munitions of war, is essential to the effective and successful exercise of the war power and the performance of the war duty, and is so closely and directly related to the power itself as to become an integral part of it.

3. That, in view of the time and expenditure necessary to the construction of such a system of transportation by the Government itself, it may, in the exercise of its constitutional discretion, instead of doing so, adopt the policy, under the war power, of fostering and promoting the existing systems of transportation, so that they may at all times be ready and adequate for these essentials.

4. That this may, under the War Power, be done in time of peace by way of reasonable preparation for war, just as it may be done in time of actual war.

5. That coming under the due and reasonable exercise of the War Power, Congress may in its discretion, as a means of fostering and promoting in full vigor these essential agencies, control and regulate, within constitutional limitations, their rates and charges, both state

and interstate—otherwise it would be in the power of the states to obstruct and defeat the war power which the states themselves conferred upon Congress and the exercise of which, for the protection of themselves and their people, they have the right to exact from Congress.

Northern Pacific Ry. Co. v. North Dakota, 250 U. S. 135.

III.

THE POWER TO ESTABLISH POST OFFICES AND POST ROADS.

The power to establish Post Offices and Post Roads, standing alone, is adequate to sustain the validity of the power exercised by Congress with reference to the State rates of carriers engaged in interstate commerce, by paragraphs (3) and (4) of Section 13 of the Interstate Commerce Act.

Referring to laws involving this same constitutional basis of authority, Mr. Justice Bradley, speaking for this Court, says:

> "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and

military exigencies, has authority to pass these laws."

California vs. Pacific Railroad Co., 127 U. S. 39.

For a most intelligent and interesting treatment of the Post Office and Post Road power, as related to this subject, see an article by Judge Edgar Howard Farrar, printed for the convenience of the Court in an Appendix to this brief.

We submit that there is no escape from the conclusion that under the Commerce Power, under the War Power, and under the power to establish Post Offices and Post Roads, the authority of Congress to enact the legislation involved in this case is ample and not open to question.

SECOND.

The Legal Interpretation of Paragraphs (3) and (4) of Section 13 of the Interstate Commerce Act.

Inasmuch as Congress has ample power under the Constitution to regulate the instrumentalities of transportation, to provide for their adequacy and efficiency, and to foster and preserve them in full vigor, the question remains what it has done, as to matters involved in this case, in the Transportation Act, 1920.

To arrive at a just conception of the problem Congress had in mind, and was dealing with when

it enacted the legislation referred to, a brief review of the conditions as they then prevailed may be helpful.

The system of regulation which was then in force—as it was first adopted, and as it had existed for thirty years—was corrective only, and took no note of any public interest except the interest to be protected against abuses and wrongs on the part of those charged with the duty of furnishing transportation.

This grew out of the controversy between the owners of the railroads and the public when the public first insisted on exercising the power of regulation.

In the early development of rail transportation, the interest of the public to obtain the advantage of these improved facilities was the only aspect of the matter that appeared, and every inducement was offered by legislative bodies—local, state and national—to induce private investment in the creation of this modern system.

Under this policy of inducement and encouragement, investors in railroad facilities came to view the properties which they created as their own private property to be dealt with and dealt in in their private interest just as any other property which was owned without qualification or restriction. This resulted in serious abuses. Favoritism, as between individuals and as between localities, arose and assumed such proportions as to arouse a deep sense of public resentment. The public thereupon sought to establish the principle that

the relationship of these great agencies of transportation and distribution was so close and so influential in its bearing upon the public welfare, that the public had a right to protect itself against abuses by imposing upon this class of property a substantial measure of regulation.

In the controversy which arose from these opposing views, public opinion became so aroused that when the principle of regulation was established, the measures to carry it into effect had reference alone to the repression and correction of abuses.

Under this corrective and repressive system, whatever abuses there were disappeared, but, in the corrective process, the financial vitality of the carriers was impaired, and they were substantially weakened in their capacity to provide facilities for the performance of their essential public duties.

It thus became important that those charged with the duties of transportation should bring this situation, with its menace of destructive consequences to the great bar of public opinion and to impress upon it the necessity for the introduction into the system of regulation of the elements of encouragement and protection which up to that time were entirely lacking.

An effort was made to do this from time to time in a desultory and unorganized way prior to 1914, but, on the breaking out of the European War, conditions became so serious that an earnest and coordinated movement was inaugurated to bring

the public mind to a realization of the existence and importance of the problem.

A committee of railroad executives visited the President and in a formal way laid the matter before him. The President responded sympathetically and helpfully, with the final result that in 1915 he brought the matter in a message to the attention of Congress, which, in response to his suggestion, created a joint committee, known as the Newlands Committee, to study the whole transportation situation.

Before that committee, the subject was carefully presented and the insistence was made that the constant input of new money was essential to the growth of transportation facilities to keep pace with the growth of commerce; that the money to make these additions and improvements must, under a system of private ownership, be attracted and could not be coerced, and that, in consequence, the credit of these carriers was, in importance, even greater in its interest and consequences to the public than to the carriers themselves.

The entrance of the United States into the European War, the consequent taking possession of the railroads by the President in the public interest and their support during the federal control out of the public treasury, postponed for the moment the problems under consideration by the Newlands Committee; but these reappeared as the time approached for the return of the properties to their owners and the resumption by them of the duties

and responsibilities of furnishing transportation to the public.

The tragic events of the war concentrated public attention upon many problems which were theretofore treated with indifference, and among the lessons which were taught the American people by the part which transportation played during the war in the co-ordination and direction of the resources of nations, was a realization of the essential dependence of the producing and commercial public upon adequate means of distribution; creating a conviction in the public mind that an efficient system of transportation was absolutely essential to the public welfare; that, in order to secure it under a system of private ownership, the credit of the carriers must be fostered and protected, and that, in consequence, the essential elements of encouragement and protection must be included in any wise system of legislative regulation.

The outgrowth of this was the adoption of the Transportation Act, 1920. For the first time in the history of regulation, the truth was recognized that the most costly system of transportation to a people is an inadequate system, that the public interest is not alone and is not principally concerned with the charges it must pay for a transportation service, but is, in a more fundamental and in a higher degree, involved in the competency and adequacy of the facilities on which their opportunity to do business at all is dependent, and that, consequently, while the public interest in the

rate of charge is great, its interest is even greater and more fundamental in the adequacy and efficiency of the transportation service.

The necessity for a change in the system and spirit of regulation was thus presented to Congress by the President in his message of December 2nd, 1918:

> "The one conclusion that I am ready to state with confidence is that it would be a disservice alike to the country and to the owners of the railroads to return to the old conditions unmodified. Those are conditions of restraint without development. There is nothing affirmative or helpful about them. What the country chiefly needs is that all its means of transportation should be developed, its railways, its waterways, and its countryside roads. Some new element of policy, therefore, is absolutely necessary—necessary for the service of the public, necessary for the release of credit to those who are administering the railways, necessary for the protection of their security holders."

Thus the conception of regulation was broadened to embrace, not only reasonableness of rates, but adequacy of revenues to insure adequate service. It came to be realized that an indubitable public interest required that a system of regulation should not alone repress and correct abuses, but should also insure to the public the transportation facilities which it needs; that, in other words, any system of regulation, to be wise and useful

in the public interest, must not only "get over but must get under" the carrier systems of the country.

These constructive policies found expression in the Transportation Act, 1920.

In Section 500 of that Act, it is declared to be the policy of Congress "to foster and preserve in full vigor both rail and water transportation," and, in Section 422 (Sec. 15a, paragraph 3 of the Interstate Commerce Act), the Commission was directed, in making its determination as to a fair return on the property devoted to the public use, "to give due consideration, among other things, to the transportation needs of the country, and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation."

Thus Congress, in the act now under consideration, undertook to create and to preserve adequate and competent instrumentalities of transportation to serve the commerce of the people.

It provided that the revenues derived from the rates of these carriers shall be adequate for these purposes.

The contention here made that it was the purpose of Congress to provide for the support and success of this national policy of transportation out of the revenues derived from interstate commerce alone, leaving the question of whether the several states would participate in this burden, or

would leave it all to rest upon interstate commerce, cannot be accepted.

The result of this would be either that the national conception of the standard of transportation facilities must be abandoned because of dissenting state opinion, or the means of sustaining it up to the national standard be cast upon the interstate part of the carrier's services, or largely upon that and the balance on the internal commerce of those states which approved of the national standard of transportation facilities, desired its establishment, and were willing to contribute to its support.

The effect of this triumph of dissenting state opinion would be that the dissenting state would, in a very real sense, regulate interstate commerce --for it would either control the standard of interstate commercial facilities or, in order that these might be maintained up to the national standard, it would force up and thus regulate the rates which must be paid by interstate shippers and by shippers of other states in their internal commerce. This would make the dissenting states dominant in the national field, and, as to their sister states taking a more liberal view, would deprive them of the right they acquired as states, in the compact of the Constitution, to have the instrumentality of transporation in which all are interested regulated and controlled, not by one of the states or by several of the states, but by the authority which represents them all.

The Transportation Act, 1920, must clearly be

construed as not permitting such a consequence. It must, if possible, be construed as providing in the ultimate result, for an equality of opportunity to all users of the instrumentality of interstate commerce, and to prevent unduly discriminatory advantages to any of them, whether these users avail themselves of the service of the instrumentality of interstate commerce in the commerce between the states or in the commerce within a state.

Any other interpretation of the act would result in the abdication by Congress of its national obligation of providing for equity among the users of the instrument of interstate commerce and in the creation of a series of discriminations which would dislocate many of the most important trade relationships in the country.

If Congress must fix the level of interstate rates between Pittsburgh and New York on a level to support an adequate and efficient system of transportation, and if the state of Pennsylvania could validly disregard this standard and put in a preferential and lower level of rates between Pittsburgh and Philadelphia, it will be seen at once that the whole constitutional system (which, by placing the control of the regulation of the instrumentalities of interstate commerce in the hands of the national government, was designed, among other things, to insure equality of opportunity as between state and interstate trade), would be destroyed and the channels of trade would be changed by the capacity for preference and advantage retained by local governments. Thus, in-

stead of the system of undue advantage and favoritism, which aroused the public opinion of the country against private managements and which was the efficient cause of the adoption by Congress and the states of the policy of regulation, being abolished, it would be simply transferred from private hands and placed in unqualified and uncontrolled operation in the hands of local governments.

No construction of an act, unless imperatively required by the express terms which Congress has used, can be tolerated which produces these results.

Instead of finding in the Transportation Act, 1920, terms which force such a construction, we find that the purpose of Congress, as therein expressed, was directly the reverse. It is true that it did not deal with the primary jurisdiction over state rates and over interstate rates in the same way; but it did in unmistakable terms assert a jurisdiction over the ultimate and final regulation of both—over interstate rates as a matter of primary jurisdiction and over state rates as a matter of supervisory jurisdiction as defined in the Act.

In Section 422 (Sec. 15a of the Interstate Commerce Act), the Commission is required to find the aggregate value of the property of the carriers held for and used in the service of transportation, and is not permitted to exclude any part of it because used for state transportation, or to make any distinction between that which is used in state service and that which is used in interstate service.

The obligation is plainly laid upon the Commission to value and include it all.

Likewise, when it comes to the question of the "fair return" prescribed by the act (which the act requires shall be 5½ or 6 per cent, as near as practicable, on the aggregate values for the first two years, and, after that, such percentage as the Commission may determine will constitute a fair return), no exclusion is permitted of the revenues derived from state traffic, but the return which must be provided is required to come from all traffic, state and interstate.

The contention insistently made that a different result must follow from the provision in Section 400 of the Transportation Act, 1920, which is thereby made a part of Section 1 of the Interstate Commerce Act, namely, that "the provisions of the act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property, wholly within one state and not shipped to or from a foreign country from or to any place in the United States as aforesaid" is unsound, for two reasons, either one of which we submit is conclusive.

First: The clause just quoted was in express terms a part of Section 1 of the Act to Regulate Commerce as it stood prior to the Transportation Act, 1920, and was a part of that act at the time of the decision by this Court of the case of *Houston & Texas Railway v. United States*, 234 U. S. 342, in which the Court, beginning at page 356, but more particularly on page 358, considered and de-

fined the proviso, now in the Transportation Act, 1920, in a case involving control of state rates by the Interstate Commerce Commission when discriminatory under the terms of the statute as it then stood.

The Court says:

> "Here, the Commission expressly found that unjust discrimination existed under substantially similar conditions of transportation and the inquiry is whether the Commission had power to correct it. We are of the opinion that the limitation of the proviso in Section 1 does not apply to a case of this sort. The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was 'wholly within one state.' These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that the

subject was thus left without governmental regulation."

This authoritative exposition of the law was before Congress when it inserted in the Transportation Act, 1920, the same words as those previously contained in the proviso to Section 1 of the Interstate Commerce Act, and the intention of Congress is thus manifest not to exclude by these words the exercise of national power over the relation of state rates to interstate rates, or as to discrimination between the two, or as to discrimination of state rates against the entire body of interstate commerce.

Second: The view that the clause referred to must be construed as an exclusion by Congress of jurisdiction of the Interstate Commerce Commission over the question of discrimination of state rates against interstate or foreign commerce, is plainly answered by the fact that in Section 416 of the Transportation Act, 1920 (paragraphs 3 and 4 of Section 13 of the Interstate Commerce Act), Congress in express terms extends the power of the Interstate Commerce Commission over such discriminations.

In the face of this direct expression of Congress, the suggestion is plainly untenable that the retention in the Transportation Act, 1920, of the proviso to Section 1 of the Interstate Commerce Act as previously existing has significance or importance as to the questions involved in this case.

Accordingly, the Transportation Act, 1920, must be construed as dealing with all rates necessary

to be controlled in order to carry out the declared purpose of the act to provide revenues for the carriers sufficient in the public interest to ensure the adequacy and efficiency of the transportation service.

It is true, as above indicated, that Congress finally determined to deal with these two classes of rates, interstate rates and state rates, in a different way.

It was urged upon Congress that the only effective method of dealing with the subject, in order to avoid destructive delays, discriminations and inequalities, and in order to meet economic conditions, was for it to assume control and regulation of all of the rates of interstate carriers as a matter of primary and original juriediction.

Congress, out of deference to the states, declined to take this view, and adopted the policy of dealing directly and primarily with interstate charges and of leaving the state rates to be dealt with primarily by the states, asserting a supervisory and corrective authority over state action only in cases of discrimination against interstate commerce. But, in the final result, it unmistakably undertook, in the act, to deal ultimately with both classes of rates—with interstate rates absolutely and primarily, and with state rates to the extent necessary to remove undue or unreasonable prejudice, advantage or discrimination, and then not as a primary, but as a supervisory authority.

No other construction of the act is tenable unless

the declared purpose of the legislation is to be defeated.

It is contended that paragraphs (3) and (4) of Section 13 of the Interstate Commerce Act, as added by Section 416 of the Transportation Act, 1920, have no broader reach, as to subject matter, than Section 3 of the Interstate Commerce Act.

This contention, of course, depends upon the construction which may be given to Section 3 of the Interstate Commerce Act. If, under a proper construction, Section 3 is as broad as the new provisions referred to unmistakably are, then the question of whether the power of the Commission has been extended by the provisions of the Transportation Act, 1920, becomes immaterial.

Manifestly Section 3 of the Interstate Commerce Act is, in the opinion of this Court, sufficiently broad to cover a discrimination against interstate commerce itself, for, in the case of the *Illinois Central Railroad Company vs. The Public Utilities Commission*, 245 U. S. 507, it said:

> "Had it (the Commission) intended to require or authorize a state-wide readjustment of intrastate rates, it doubtless would have given direct expression to that purpose which easily could have been done in a few lines."

It does not seem necessary, however, to concern ourselves with any nice distinctions as to the meaning of Section 3 of the Interstate Commerce Act, for paragraphs (3) and (4) of Section 13 of the

Interstate Commerce Act, as added by the Transportation Act, 1920, confer, in unmistakable terms, the authority claimed and exercised by the Commission in this case.

Undoubtedly, however, paragraphs (3) and (4) undertook to deal with the question in a somewhat different way from the way it is dealt with in Section 3 of the Interstate Commerce Act.

The prohibitions of Section 3 of the Interstate Commerce Act are in express terms directed to the conduct of the carrier, whereas in paragraph (3) of Section 13 it is not the conduct of the carrier, but the acts done by the state or under its authority or by the President under the federal control act, which are dealt with.

In paragraph (4) authority is conferred upon the Commission to establish a state rate in the place of the one which under the provisions of that section it condemns.

And unmistakably too, whether or not this is a power already possessed by the Commission under Section 3 of the Interstate Commerce Act, the Commission is, by the Transportation Act, empowered and directed to determine the question as to whether anything done, either by the state or under its authority, as to state rates, etc., causes any undue or unreasonable advantage, preference or prejudice as between persons and localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce as a whole.

The Commission is thereby given the power, and it is made its duty, to protect the body of interstate and foreign commerce against undue or unreasonable preferences, prejudices and discriminations created by the act of a state or under its authority.

It takes no argument to show, if the revenues permitted by a state from state traffic do not bear a proper relationship to the revenues which Congress in this act has required the Commission to provide from interstate commerce, that there is an unjust and hurtful discrimination against interstate commerce.

If this is not so, then interstate commerce must under the requirements of the act continue to move on more disadvantageous terms than state traffic, and those who engage in state traffic can do their business on better terms than those who engage in interstate traffic. Under such conditions, the volume of interstate traffic would be diminished to the extent that the state traffic done on more advantageous terms can take its place and the channels of trade and the interest of communities and their business relationship will be altered by the fact as to whether or not the business originates on one side or the other of a state line.

The phrase here used, "unjust discrimination," manifestly was not intended to have any technical or strained construction, and was not intended to have such a construction as would disappoint the large purpose of the act, which was to provide revenues for the carriers sufficient to ensure, in

the public interest, adequate and efficient transportation facilities and to ensure equality of treatment among all those availing themselves of the transportation service.

In fact the terms "unjust discriminations" are used by the Commission itself as including such expressions as "undue prejudice" and "undue burden upon interstate commerce."

Natchez Chamber of Commerce v. L. & A. Ry. Co., 58 I. C. C. 618.

In that case the Commission says, after referring to the case as involving the question of "discrimination":

> "In this proceeding we are called upon to prescribe reasonable rates for the future between Natchez and points in western Louisiana and to remove such undue prejudice as may be found to exist. If in doing this an increase in the rates applying within western Louisiana results, it is manifest that the present rates are unduly low (that is state rates) and constitute an undue burden upon interstate commerce."

This undue burden was, in that case, dealt with by the Commission under its power to prevent undue prejudice and unjust discrimination.

Manifestly no other conclusion could be reached and manifestly when Congress undertook to deal with and protect the whole body of interstate commerce against undue prejudice and unjust dis-

crimination, it was, from a legal standpoint, unnecessary for it to go further and to condemn, with meticulous particularity, "undue burden," that being covered by the terms already used.

When it is remembered that under 15a of the Interstate Commerce Act it is made the duty of the Commission to provide revenues up to a certain standard and to supply out of interstate commerce all that is not contributed by state commerce, and that thus, in the instant case, if the state can effectively prevent the contribution from state business of the part of the revenues which it was assumed in *Ex Parte* 74 they would contribute, then it would become necessary, under the law, for the Interstate Commerce Commission to increase again the rates on interstate commerce to produce the result required by the Act. Thus, if the power here claimed by the appellants may be exercised by them, the result would be, under the automatic operation of the Transportation Act, a further increase of interstate rates and a further discrimination against interstate commerce.

Congress had in view no narrow purpose.

In this case there is brought to the Bar of this Court the broad and reasonable policy adopted by Congress to deal with the entire subject of transportation from a national standpoint and to provide for its adequacy and competency, in the interest of all the people, by a system which will foster and preserve its instrumentalities in full vigor and will create equality of commercial opportunity and privilege as between all its users, ir-

respective of their location and irrespective of the markets which they seek to reach.

The contention which we make is, we submit, justified by the broad national purpose expressed in this act, and by the moral considerations of equity and of equality of opportunity to all the people, with favoritism towards none and with special privilege made impossible.

THIRD.

THE EXERCISE BY THE COMMISSION, IN THIS CASE, OF THE POWER CONFERRED UPON IT BY PARAGRAPHS (3) AND (4) OF SECTION 13 OF THE INTERSTATE COMMERCE ACT (SECTION 416 OF THE TRANSPORTATION ACT, 1920).

This subject has been treated at length by us in a separate brief, and we respectfully ask the attention of the Court to the views there presented. It is unnecessary to repeat them here.

We submit on the whole case that the order appealed from should be affirmed.

Respectfully submitted,

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Washington, D. C., February 28, 1921.

APPENDIX

Reprint of an article entitled "The Post-Road Power in the Federal Constitution and Its Availability for Creating a System of Federal Transportation Corporations," by Hon. Edgar Howard Farrar, published under date of September 9th, 1907.

FORE-NOTE

A draft of the within paper was prepared to be read before the American Bar Association at Portland, Me., at its August meeting, but the Executive Committee could not give it place on account of the crowded condition of the previously arranged program. It is now given to the public and to the profession, as my answer to the criticisms made upon a letter written by me to President Roosevelt in April, suggesting the use of the post-road clause of the Federal Constitution by creating Federal Post-Road Corporations, as an available means to bring about a Federal control of transportation, and a drastic control of transportation corporations, coupled with their full protection from the destructive action of their enemies within and without.

EDGAR HOWARD FARRAR.

Sept. 9th, 1907.

THE POST-ROAD POWER IN THE FEDERAL CONSTITUTION AND ITS AVAILABILITY FOR CREATING A SYSTEM OF FEDERAL TRANSPORTATION CORPORATIONS.

The object of this paper is to demonstrate that, under the express grant of power made in the Constitution of the United States "to establish post-offices and post-roads," the Congress may organize a system of national post-road corporations as instrumentalities of the Federal Government to construct and operate post-roads, with the incidental power to deal in transportation of persons and property, inasmuch as transportation is of the essence of the governmental function, to assist in the performance of which these corporations are created.

The right of the Federal Government to create corporations as an incident to the grants of power and function made to it in the Constitution, and as a necessary and proper means to enable it to exercise these powers and functions, was settled in the great cases of McCulloch *vs.* State of Maryland, 4th Wheaton, 316, and Osborn *vs.* U. S. Bank, 9 Wheaton, 738, which affirmed the constitutionality of the charter of the second Bank of the United States.

The authority of those cases has never been shaken nor diminished. On the contrary, the principles therein announced have been approved and restated again and again by the courts of the Nation, and the Congress has acted upon them in using its powers to charter corporations.

Upon these principles rests the whole system of national banks. In regard to these corporations, the Su-

preme Court of the United States in Farmers' Bank *vs.* Dearing, 91 U. S., 29, said:

"The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United States. The reasoning of Secretary Hamilton and of the Court in McCulloch *vs.* Maryland, and in Osborn *vs.* U. S. Bank therefore applies. The national banks organized under the act are instruments designed to be used to aid the Government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge."

Under its war power the Congress created a corporation called "The National Home for Disabled Volunteer Soldiers," and in Butler *vs.* National Home, etc., 144 U. S., p. 64, it was held that such corporation could remove a suit against it to the Federal Court on the principle settled in The Pacific Railroad Removal Cases, 115 U. S., 1, that every suit by or against a Federal corporation is one arising under the Constitution and Laws of the United States.

Pitching its power to act upon three distinct grants in the Constitution, the power to regulate commerce among the States, the power to establish post-offices and post-roads and the war power, the Congress has chartered three great transcontinental systems of railroad, the Union Pacific Railroad, The Northern Pacific Railroad and the Texas & Pacific Railroad.

In California *vs.* Pacific Railroad Company, 127 U. S., p. 39, speaking of these corporations and deciding that the franchises of the Union Pacific Company were, as federal franchises, beyond the power of the State of California to tax, the Supreme Court of the United States said:

"It cannot at the present day be doubted that Congress under the power to regulate commerce among the

several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of State as well as Federal corporations. See Pacific Railroad Removal Cases, 115 U. S., 1, 14, 18."

This language of Mr. Justice Bradley, speaking for the whole Court, has been twice quoted and affirmed, first by Mr. Justice Harlan speaking for the whole Court in Cherokee Nation *vs.* Kansas Railway Co., 135 U. S., at page 658, a case which will be further discussed below, and second by Mr. Justice Gray, speaking for the whole Court in Luxton *vs.* North River Bridge Company, 153 U. S., p. 533, affirming the constitutionality of the act of the Congress of July 11th, 1890, incorporating the North River Bridge Company, authorizing it to locate, con-

struct and maintain a bridge and its approaches over the Hudson River between the City of New York and the State of New Jersey, and to exercise the power of eminent domain for that purpose in the Courts of the United States.

It will be noted that the Congress in chartering this company followed the precedent laid down in the Pacific Railroad acts of incorporation, and pitched its action on the commerce, the postal and the war powers.

Whatever may have been the early opinion of lawyers, dissenting judges, politicians and statesmen of the strict constructionist school, it is now settled beyond controversy that the Federal Government has the power of eminent domain to be exercised in its own courts for all the purposes of the grants made to it in the Constitution, that it may delegate this power to corporations created by it or to State corporations selected by it as its agents, and that this power may be exercised without the consent or permission of the States.

This power was not used or declared until a late date in the history of the Republic, and was established in Kohl *vs.* United States, 91 U. S., 367, which was a proceeding by the United States in the Circuit Court of the United States to condemn land in the City of Cincinnati for a federal court building.

The Court said:

"It has not been seriously contended during the argument that the United States Government is without power to appropriate lands or other property within the State for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general Government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-

houses, for custom houses, post-offices, and court houses, and for other public uses. If the right to acquire property for such uses may be made barren a right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal Government, the constitutional grants of power may be rendered nugatory, and the Government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. No one doubts the existence in the State governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the Government, either mediately or immediately and independent of the consideration whether they would escheat to the Government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vattel, c. 20, 34; Bynk., lib. 2, c. 15; Kent's Com., 338-340; Cooley on Const. Lim., 584 *et seq.* But it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal Government. That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

"But, if the right of eminent domain exists in the Federal Government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In Ableman *vs.* Booth, 21 How., 523, Chief Justice Taney described in plain language the complex nature of our Government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action, prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own

sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post offices and to create courts within the States was conferred upon the Federal Government, included in it was authority to obtain sites for such offices and for court houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The Fifth Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion that, on making just compensation, it may be taken? * * *

"It is true, this power of the Federal Government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. * * * If the United States have the power it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction, and of the right of exclusive legislation after the land shall have been acquired."

In U. S. *vs.* Fox, 94 U. S., 315, the court, while maintaining the power of a State to regulate the tenure of real estate, and consequently holding void a bequest of real estate to the United States, reaffirmed the doctrine of the Kohl case.

United States *vs.* Jones, 109 U. S., 513, was a proceeding by the United States in a State court, under the authority of an Act of the Congress, to determine the value of lands damaged by the improvement of the Fox river by the Government. The Court held that the power to take private property for public uses in the exercise of

the right of eminent domain is an incident of sovereignty, belonging to every independent government, and requiring no constitutional recognition, that it exists in the Government of the United States, and that that Government may delegate to a tribunal, created under the laws of a State, the power to fix the amount of compensation to be paid by the United States for private property taken by them in the exercise of their right of eminent domain.

Van Brocklin *vs.* State of Tennessee, 117 U. S., 151, involved the question as to the power of a State to tax lands acquired by the United States within the limits of a State without the State's consent, and in the course of the decision that no such power exists, the court restates and reaffirms the Kohl case, and states that the power of eminent domain may be exercised "with or without the concurrent act of the State in which the land is situated" (p. 154).

Fort Leavenworth R. R. Co. *vs.* Lowe, 114 U. S., 525, involved the right of a State to tax a railroad built through a government reservation, over which the State had ceded her political jurisdiction to the United States, with the express retention in the act of cession of the right to tax the property and franchises of such corporations, located on the reservation. The Court held that such retention was valid as it did not interfere with the use of the property as a military post. The doctrine of the Kohl case is restated and affirmed, and this language is used (p. 530):

"It would seem to have been the opinion of the framers of the Constitution that, without the consent of the States, the new government would not be able to acquire lands within them; and therefore it was provided that when it might require such lands for the erection of forts and other buildings for the defence of the country, or the discharge of other duties devolving upon it, and the consent of the States in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them.

Purchase with such consent was the only mode then thought of for the acquisition by the general government of title to lands in the States. Since the adoption of the Constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the general government of lands within the States. If any doubt has ever existed as to its power thus to acquire lands within the States, it has not had sufficient strength to create any effective dissent from the general opinion. The consent of the States to the purchase of lands within them for the special purposes named is, however, essential, under the Constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, *unless used as a means to carry out the purposes of the government*, is subject to the legislative authority and control of the States equally with the property of private individuals. * * * Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification, that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. *Such is the law with reference to all instrumentalities created by the general government.* Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits."

Cherokee Nation *vs.* Kansas Railway Co., 135 U. S., 641, referred to above, presented the question of the power of the United States to grant to a State corpora-

tion organized to build an interstate railway, a right-of way through the Indian Territory, coupled with the right to condemn the land of individual occupants. The constitutionality of the act was affirmed, the Court saying (p. 655):

"In view of these authorities, the contention that the lands through which the defendant was authorized by Congress to construct its railway, are held by the Cherokees as a sovereign nation, without dependence on any other, and that the right of eminent domain within its territory can only be exercised by it, and not by the United States, except with the consent of the Cherokee Nation, cannot be sustained. The fact that the Cherokee Nation holds these lands in fee simple under patents from the United States, is of no consequence in the present discussion; for the United States may exercise the right of eminent domain, even within the limits of the several States, for purposes necessary to the execution of the powers granted to the general Government by the Constitution. Such an authority, as was said in Kohl *vs.* United States, 91 U. S., 367, is essential to the independent existence and perpetuity of the United States, and is not dependent upon the consent of the States. * * * As was said by Mr. Justice Bradley in Stockton *vs.* Baltimore, etc., Railroad, 35 Fed. Rep., 9, 19: 'The argument based upon the doctrine that the States have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the Constitution to the Government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States Government should have an eminent domain still higher than that of the State, in order that it may fully carry out the objects and purposes of the Constitution, then it has it. Whatever may be the necessity or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the Constitution that the Government of the United States is invested with full power and complete power to execute and carry out its purposes.' It would be very strange if the National

Government, in the execution of its rightful authority, could exercise the power of eminent domain in the several States, and could not exercise the same power in a Territory occupied by an Indian nation or tribe, the members of which were wards of the United States, and directly subject to its political control. The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general Government to take them for such objects as are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner."

The case of Stockton *vs.* Baltimore, etc., Railroad, 32 Fed. Rep., 9, from which the foregoing quotation of Mr. Justice Bradley is approvingly made by the Supreme Court, is important and instructive. It was an information filed by the Attorney-General of the State of New Jersey against two railroad companies, one chartered by the State of New Jersey and one chartered by the State of New York, to prevent them from constructing a bridge over Arthur Kill, separating the States of New Jersey and New York, which bridge they were authorized to construct by an act of the Congress of the United States. The State set up her own legislative act prohibiting the construction of such a bridge without her consent which had never been obtained; that she owned in her sovereign right the soil under the waters of Arthur Kill from the centre line thereof to the high-water mark upon which the piers of the bridge were to rest and the bridge was to stand; that this land could not be taken at all by the Congress or by any corporation authorized by it without her consent; that, if it could be taken at all, compensation must be made her for such taking, for which compensation the act did not provide, and that for these reasons the act of the Congress was unconstitutional and void. The act was declared constitutional as a proper

exercise of the power to regulate commerce among the States. The Court held:

1st. That the Congress had power to build the bridge without the consent of the State.

2d. That it had power to delegate this authority to State corporations.

3d. That if it is necessary that the United States Government should have an eminent domain still higher than that of the State in order that it may fully carry out the objects and purposes of the Constitution, then it has it.

4th. That the State held the lands under navigable waters not for the purpose of emolument, but for public use, especially for the public use of navigation and commerce, that consequently the use of a part of that soil for a bridge to be used for commercial purposes was not a diversion of the property from its original public use, and the State was entitled to no compensation therefor.

In Luxton *vs.* North River Bridge Company, 153 U. S., 525, already referred to, the power of the Congress to grant to a bridge company, created by it, the right to condemn property for a bridge and its approaches between the City of New York and the State of New Jersey was unanimously affirmed. Careful examination and study of this case is particularly recommended to all those journalistic expounders of constitutional law who repel with contempt any conclusion that might lead to the profanation of the (to them) sacred soil of the City of New York by a federal highway.

In U. S. *vs.* Gettysburg Electric Ry., 160 U. S., the use of the power of eminent domain by the Federal Government for a patriotic purpose—the preservation and embellishment of the battlefield of Gettysburg—was maintained; and it was likewise maintained in Chappell *vs.* U. S., 160 U. S., 499, to condemn land for a lighthouse,

and the power again declared to exist "with or without any consent or concurrent action of the State."

In Monongahela Navigation Co. *vs.* U. S., 148 U. S., 312, the United States used, without question, the power of eminent domain to condemn a dam and lock, constructed in the Monongahela River by a company authorized by the State to improve the navigation of such river and to collect tolls for the use of the lock. The Government of the United States took over the improvement of the river itself, and the Court held that it must pay not only for the dam and lock itself but for the franchise granted by the State under which it was operated.

Most of the cases cited holding that the Congress under the interstate commerce grant has power to organize corporations to locate, build and maintain interstate highways, and to grant such corporations the power of eminent domain for that purpose, imply, and some of them express the proposition that the Congress has itself the power to construct such highways. See the California case, *supra.*

In Luxton *vs.* North River Bridge Co., *supra* the Court said:

"Congress has likewise the power exercised early in this century by successive acts in the case of the Cumberland or National Road from the Potomac across the Alleghenies to the Ohio, to authorize the construction of a public highway connecting several States."

In Stockton *vs.* Baltimore, etc., R. R., *supra*, Mr. Justice Bradley said:

"Under this power" (to regulate commerce among the States) "the navigation of rivers and harbors has been opened and improved, and we have no doubt that canals and waterways may be opened to connect navigable bays, harbors and rivers with each other or with the interior of the country. Nor have we any doubt that under the same power, the means of commercial communication by land as well as by water may be opened up by Congress between different States, whenever it shall see fit to do so,

either on the failure of the States to provide such communication, or whenever, in the opinion of Congress, increased facilities of communication ought to exist. Hitherto it is true the means of commercial communication have been supplied either by nature in the navigable waters of the country, or by the States in the construction of roads, canals and railroads, so that the functions of Congress have not been largely called into exercise under this branch of its jurisdiction and power, except in the improvement of rivers and harbors, and the licensing of bridges across navigable streams. But this is no proof that its power does not extend to the whole subject in all its possible requirements. Indeed it has been put forth in several notable instances, which stand as strong arguments of practical construction given to the Constitution by the legislative department of the Government. The Cumberland or National Road is one instance of a grand thoroughfare projected by Congress, extending from the Potomac to the Mississippi."

In Monongahela Navigation Co. *vs.* United States, *supra*, and in Railroad Co. *vs.* Maryland, 21st Wallace, 456, it was distinctly held that the interstate commerce power of the Congress was the same over an interstate artificial highway as over a navigable water.

In the former case the Court said (p. 341):

"The theory of the Government seems to be that the right of the Navigation Company to have its property in the river, and the franchises given by the State to take tolls for the use thereof, are conditional only, and that whenever the Government, in the exercise of its supreme power, assumes control of the river, it destroys both the right of the company to have its property there, and the franchise to take tolls. But this is a misconception. The franchise is a vested right. The State has power to grant it. It may retake it, as it may take other private property, for public uses, upon the payment of just compensation. A like, though a superior, power exists in the National Government. It may take it for public purposes, and take it even against the will of the State; but it can no more take the franchise which the State has given than it can any private property belonging to an individual.

"Notice to what the opposite view would lead: A railroad between Columbus, Ohio, and Harrisburg, Pennsylvania, is an interstate highway, created under franchises granted by the two States of Ohio and Pennsylvania, franchises not merely to construct, but to take tolls for the carrying of passengers and freight. In its exercise of supreme power to regulate commerce, Congress may condemn and take that interstate highway; but in the exercise of that power, and in the taking of such property, may it ignore the franchises to take tolls, granted by the States, or must it not rather pay for them, as it pays for the rails, the bridges, and the tracks? The question seems to carry its own answer. It may be suggested that the cases are not parallel, in that in the present there is a natural highway; while in that suggested it is wholly artificial. But the power of Congress is not determined by the character of the highway. Nowhere in the Constitution is there given power in terms over highways, unless it be in that clause to establish post-offices and post-roads. The power which Congress possesses in respect to this taking of property springs from the grant of power to regulate commerce; and the regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway. They are simply the means and instrumentalities of commerce, and the power of Congress to regulate commerce carries with it power over all the means and instrumentalities by which commerce is carried on. There may be differences in the modes and manner of using these different highways, but such differences do not affect or limit that supreme power of Congress to regulate commerce, and in such regulation to control its means and instrumentalities. We are so much accustomed to see artificial highways, such as common roads, turnpike roads and railroads, constructed under the authority of the States, and the improvement of natural highways carried on by the General Government, that at the first it might seem that there was some inherent difference in the power of the National Government over them. But the grant of power is the same. There are not two clauses of the Constitution, each severally applicable to a different kind of highway."

The same thought was expressed in *Ex parte* Debs, 158 U. S., 590, as follows:

"Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the Courts have been principally concerned therewith. The fact that in recent years commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fulness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business, and the habits of life of the people, vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat or sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so it is with the grant to the National Government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

Transportation of persons and things is an absolutely necessary incident to three separate and distinct grants of power in the Constitution, the power to regulate commerce among the States, the military power and the postal power.

The control of the Federal Government over interstate transportation is an implication from the power to regulate commerce, and an appropriate means to enable the Government to exercise its granted power. This grant is exclusive and unlimited. As well said by Mr. Justice Bradley in the Stockton case: "The power of

Congress is supreme over the whole subject, unimpeded and unembarrassed by State lines or State laws, and in this matter the country is one, and the work to be accomplished is national; State interests, State jealousies and State prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no States." Under this power the Federal Government has taken entire possession and control of transportation by water, and of the navigable highways of the country, even those which are solely within the limits of a State. No one may own or operate a vessel, engaged in commerce on any navigable water in the Nation, unless she is enrolled and licensed under the laws of the United States, unless she is inspected, if a steam vessel, at regular intervals as to her hull, boilers and appliances by Federal officials, unless she is manned by officers who hold Federal licenses, and unless she is navigated according to the rules prescribed by Federal authority. Rivers, bays, lakes and harbors have been improved and made navigable when they were not naturally navigable. New channels have been opened. Old ones have been closed. The authority of the Federal Government over these natural highways has been judicially established in a case in which two sovereign States were parties, *i. e.*, South Carolina *vs.* Georgia, 93 U. S., 4. The Congress has not yet exercised its full power over interstate transportation by land over artificial highways, nor even to the extent to which it has exercised it over transportation by water over natural highways.

The control of the Federal Government over transportation for military purposes is also a necessary incident to the war power. It may transport its armies and its war material by any means it chooses to select. It may provide its own instrumentalities for that purpose, or it may use private or quasi-public instrumentalities. It may use existing highways, or it may construct and operate such highways itself. Nobody ever doubted or

questioned the power of the Congress to construct and operate military roads, and it exercised the power several times in the early days of the country.

It is a matter of history that Jefferson Davis, both statesman and soldier as he was, advocated the construction by the United States, as a military necessity, of a railroad connecting the Atlantic and the Pacific Ocean, and the surveys for such a road were made during his incumbency of the office of Secretary of War. The Union Pacific Railroad was the outcome of this plan. The Congress did not construct it itself, but it organized a corporation for that purpose, and gave it enormous grants of land and money to aid in its construction, and, as stated above, on the face of the statute, pitched its authority so to act upon the military power, the commerce power and the postal power.

Transportation being of the very essence of the postal power, the Constitution contains an express and specific grant to the Congress of power "to establish Post Roads." It is the only specific grant in the Constitution over highways.

Under this express grant of power can the Congress itself construct and operate highways for postal purposes?

To the present generation of Americans who have seen the disappearance of all that narrow sect who seemed to regard the Federal Government as an alien enemy, who denied to it the powers appropriate to the accomplishment of its purposes, who particularly denied its power to make internal improvements of any kind, or to acquire lands within the limits of a State even for Federal purposes without the consent of the States, and who denounced as a rank usurpation the decision of the Supreme Court as to the charter of the Second Bank of the United States, and as to the want of power in the States to destroy it by taxation, the answer to this proposition is free from difficulty, and is affirmative.

The views of this extinct sect are well expressed in Mr. Justice Daniel's dissenting opinion in Searight *vs.* Stokes, 3 How., at page 180, who said:

"I hold then that neither Congress nor the federal government in the exercise of all or any of its powers or attributes posseses the power to construct roads, nor any other description of what have been called internal improvements, within the limits of the State. That the territory and soil of the several States appertain to them by title paramount to the Constitution, and cannot be taken, save with the exception of those portions thereof which might be ceded for the seat of the federal government, and for sites permitted to be purchased for forts, arsenals, dock yards, etc. That the power of the federal government to acquire, and that of the States to cede to that government portions of their territory, are by the Constitution limited to the instances above adverted to, and that these powers can neither be enlarged nor modified, but in virtue of some new faculty to be imparted by amendments to the Constitution."

They further find full development in great detail in the message of President Monroe of May 4th, 1822, vetoing an act of the Congress imposing tolls for the use of the Cumberland or National Road, he holding that neither under the power to regulate commerce, nor under the post-road power, nor under any other power, could the Congress build or authorize the building of a road in the States; and also in the message of President Polk of August 3d, 1846, vetoing an appropriation of $1,374,450, for the improvement of certain harbors, rivers and lakes, on the ground that the United States had no constitutional power to construct works of internal improvement, or to appropriate money from the treasury for that purpose. Would not the men of today "stare and gasp" if the President should veto the River and Harbor Bill on any such grounds?

The power of the Government on this subject is now judicially settled by the case of South Carolina *vs.*

Georgia, cited above, and long before that case was decided, had been settled by the common sense and acquiescence of the whole American people.

The zeal of the anti-internal improvement faction led them to attack even the express power to establish post-offices and post-roads. They maintained that such power was only a power to direct where post-offices should be kept, and to designate or point out what roads shall be mail roads. They denied the power to build a post-office and to take land for that purpose, and to build a post-road and to take land for such purpose. This ancient controversy with the arguments in detail on both sides is set forth in full in Judge Story's Commentaries on the Constitution from Section 1123 to 1143. He does not directly express his own opinion, but says the "reader must decide for himself on the preponderance of the argument;" but, he calls attention to the fact that the point turns on the interpretation of an express grant of a "new and substantive power unknown before in the national government," and that "here, if ever, the rule of interpretation which requires us to look at the nature of the instrument, and the objects of the power, as a national power, in order to expound its meaning, must come into operation."

In view of the established doctrines set forth in the judicial opinions above referred to, the arguments of the narrow constructionists against the right to construct post-roads have been demolished. It is impossible to maintain that highways may be constructed and established without the consent of the States, and the power of eminent domain be used and granted for that purpose, as a mere incident to the power to regulate commerce, and at the same time to deny that an express grant of a great national power, exclusive in its nature, "to establish post-roads," does not mean what it says, and does not convey the power to build, maintain and operate highways for postal purposes.

The people of the United States, acting through the Congress, which has always repudiated this narrow construction, have answered the "pointing out and designating" theory by acquiring land and building a government post-office building in the principal towns and cities of every State in the Union.

The Congress in every charter they have granted for a railroad or a bridge, or in every authorization to a State corporation to build a bridge, have expressly pitched their right so to act on the post-road power in whole or in part. An investigation of these acts of authorization will show that as a rule the post-road power is the only one referred to. Although it was made the sole basis of the act legalizing the Wheeling Bridge, after it had been condemned by a decree of the Supreme Court, yet when that act came up for consideration in Pennsylvania *vs.* Wheeling & Belmont Bridge, 18 How., 421, the court declined to enter into a discussion of the post-road power, on the ground that if that power was insufficient to legalize the bridge the interstate commerce power was sufficient.

But we are not without judicial determination of this question. The whole subject was discussed in a luminous and exhaustive manner by the Supreme Court of Kentucky in the case of Dickey *vs.* Turnpike Company, 7 Dana (37 Ky. Rep.), 113, which involved the liability of a U. S. mail carrier and contractor to pay tolls for carrying the mails over a State turnpike road. This opinion, rendered by Chief Justice Robertson, and concurred in by Thomas Marshall, two of the greatest lawyers ever produced by that State, is too long to quote, but some extracts from it are necessary to the discussion. After pointing out that the Congress of the Confederation had only power to establish post-offices between the States, and no power whatever to establish post-roads, and that it had, under its post-office power, used and designated the State roads as postal

routes, and that the new and larger grant of power in the Constitution, being one made to a national government for national purposes, must be given some other interpretation than that of merely designating as post-roads State roads belonging, to, maintained by and absolutely under the control of the States, a power which the National Government would have under the post-office power alone, the Court said:

"For we are clearly of the opinion that both the objects contemplated by the grant of the new power to establish post-roads, and the plain constructive import of the grant itself, as made in the Constitution, show that this comprehensive and express power was given, not for authorizing the mere designation and use of State Roads as post-roads, but for enabling the general government to make, repair, and keep open such roads in every State, as might under any circumstances be necessary for the most effectual and satisfactory fulfilment of the great national trust of transporting the mails safely,, certainly, speedily and punctually, without any necessary dependence on the policy, or will or purse of any one of the States; and these were in our opinion the only ends for which that express power was given."

Answering the arguments as to the meaning of the word "establish," the Court said (p. 125):

"Whether we consider the popular use of the word 'establish' or the definition of it by the most approved lexicographers, or the admitted import of it, in the preamble and in the fourth clause of the eighth section of the federal constitution, it must be understood to mean, not merely to designate, but to create, erect, build, prepare, fix permanently. Thus, to establish a character, to establish oneself in business, to establish a school, manufactory, or government—all common and appropriate phrases—is not to assume or adopt some pre-existing character, or business, or school, or manufactory, or government. To establish, in each of those uses of the phrase, clearly expresses the idea of creating, preparing, founding, or building up. In the same sense, too, it is used and understood in the Bible; thus it is said 'The

'Lord by wisdom hath founded the earth; by understanding hath established (prepared) the heavens.' Proverbs, iii, 19.

"Just so, also, is it used and understood in the Federal Constitution. Thus we find in the preamble these words, 'establish justice'; 'establish this Constitution'; and in the fourth clause of the eighth article, power given to Congress' 'to establish an uniform rule of naturalization, 'and uniform laws on the subject of bankruptcies 'throughout the United States.'

"Thus we might present almost endless illustrations of the fact that the popular and philological, sacred, and profane, oracular and political import of 'establish,' is not to designate, but 'to found, prepare, make, institute and confirm.'

"It appears to us, therefore, that 'to establish post-offices and post-roads' means *ex vi termini*, not only the designation and adoption of an existing house and road for a post-office and a post-road, but also, more comprehensively, the renting or building of a house, and the construction and the reparation of a road, and the appropriation of money for any of those national purposes, whenever any of them shall be deemed useful. And the unquestionable fact that 'to establish' imports to make or create, in every other place where it is used in the Constitution, and especially in the fourth clause of the eighth section, tends persuasively, if not conclusively, to prove that the same words used without any qualification directly afterwards in another clause of the same Constitution, were understood in the same sense in which they were employed in the antecedent clause, as well as in the preamble. We can perceive no ground for discrimination. The subject matter of the two clauses is not of a nature so essentially different as to authorize a more comprehensive interpretation of the power in the one clause, and a more restrictive construction of it in the other; and the object was the same in both; that is, to place the United States above dependence on any one of the States, so far as naturalization, and bankruptcy, and post offices, and post roads might be concerned as national objects."

It may further be noted that Article VII of the Constitution provides that "the ratification of the conventions

of nine States shall be sufficient for the *establishment* of this Constitution between the States so ratifying the same," and that Article III of that instrument vests judicial power in the Supreme Court and in such inferior courts as "the Congress may from time to time ordain and *establish*." Indeed, the use of the word "establish" in our constitutional legislation in its broad sense of "creating or making" antedates the Constitution itself. Thus it is four times used in the Articles of Confederation, once in Art. 6 speaking of such regulations of letters of marque and reprisals "as shall be established by the United States, etc.," and three times in Art. 9, granting the power "of *establishing* rules as to captures on land and water," "of *establishing* courts of appeal in cases of capture," and "of *establishing* and regulating post offices from one State to another." Again, the proceedings of the convention of 1787 which framed the Constitution give many instances of the use of the word "establish," going to show that when used in a grant of power it was the broadest and most comprehensive word in the legislative vocabulary: thus, propositions were made and voted down to grant to the Federal Government power "to *establish* a university," "to *establish* seminaries for the promotion of literature and the arts and sciences," "to *establish* public institutions, rewards and immunities for the promotion of agriculture, etc."

And again the Court said in the Dickey case:

"All the powers over post-offices and post-roads which the States ever possessed have been wisely transferred as one indivisible national power to the general government, which now possesses of course all the authority in that respect, which all the people of all the States, either aggregately or in separate State Sovereignties could possess and delegate. Under the plenary power to establish post-roads Congress must, therefore, have as much right to make and repair roads as the States ever had for the purpose of having suitable post-roads. The consent of a

State is not indispensable; for if the Constitution gave the power, it exists without the concurrence of any State; and if the Constitution did not delegate the power to Congress the consent of a State or of all the States could not give it without an amendment of that national charter, from which alone Congress derives or can derive legislative authority."

This quotation expresses the same doctrine as that declared by the U. S. Supreme Court in *Ex parte* Rapier, 143 U. S., 134, where the power of the Congress to exclude lotteries from the mails was affirmed on the ground that:

"The States before the Union was formed could establish post-offices and post-roads, and in so doing could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress, it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective."

In Pensacola Telegraph Co. *vs.* Western Union Telegraph Co., 96 U. S., 1, where the Supreme Court of the United States declared a State statute giving an exclusive right to a State Telegraph Company within certain of its territory void as against a foreign corporation acting under a federal statute giving all companies complying with its terms the right to erect their poles and string their wires along any authorized military or post-road, the Court said:

"Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress because, being national in their operation, they should be under the protecting care of the National Government. The powers thus granted are not confined to the instrumentalities of commerce or of the postal service known or in use when the Constitution was adopted,

but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are sucessively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times and under all circumstances."

The above language was quoted with approval by the Court in the Lottery Case, 188 U. S., p. 350.

The general opinion of the commentators on the Constitution is that under the post-road power the Congress may construct such roads.

Rawle on the Constitution, p. 103.
Hare's American Const. Law, Lecture XV.
Sutherland, Notes on U. S. Const., 176.

Even my beloved and devoted old friend, the Honorable John Randolph Tucker, the strictest of the Strict Constructionists, admits this proposition (Tucker on the Constitution, Section 276), but apparently seeks to limit the power to cases where there are no State roads, and says that to construct a post-road for any other than postal purposes would be a fraud on the Constitution. Just so it was said that the United States Bank was a fraud on the Constitution because it was given general banking powers, and the organization of the national banks and of the Pacific Railroads may with just as good reason be similarly denounced.

I, therefore, maintain that, at this date in the history of the Constitution, the proposition is impregnable that the Federal Government has the full and complete power to establish all over this country, and from each locality in it to every other locality in it, a system of post-roads; that it may locate such roads and condemn property therefor in its discretion, subject only to the obligation of

making compensation for property taken or damaged, and to the obligation of not interfering with the instrumentalities of the State governments; that these roads may be of any sort or kind the Congress may select, dirt roads, turnpikes, or railroads, moved by steam, electricity or any other power; that it may confine the use of these roads strictly to its own purposes, postal, governmental and military, or it may permit their use for other purposes; that it may permit these uses for other purposes free of tolls and charges, or it may fix for such uses any tolls or charges it may think proper.

There is, I submit, no just ground for the doubt, expressed by Mr. Rawle, as to the constitutional power in the Federal Government to charge tolls for the use of a post-road, in case it should permit its use for other purposes. The sovereign and unlimited power to build, operate and maintain post-roads necessarily implies the right to permit their use and to charge tolls for such use, in order to lighten the burden on the general public of building and maintaining such roads and to distribute it among those who are most benefited. Such is the common practice of all governments. In order to facilitate the construction of the Panama Canal, the Government now owns and operates a line of vessels from New York to Colon and carries its own officers and materials, and also freight and passengers for hire. Is this unconstitutional?

If the Government should under the interstate commerce power construct an interstate highway, could it not charge tolls for the use of such highways? What possible objection could be urged against this right? The States have the right to improve the natural highways within their borders and to charge tolls for the use of the facilities furnished. The Federal Government having the supereminent right to improve such highways, and, as shown above in the Monongahela Navigation Company case, to expropriate franchises and works au-

thorized by the States in such streams, why can it not charge tolls for the facilities furnished by it? That it has not heretofore made any such charges is due to the wealth and generosity of the Government, and not to any want of power to make them.

If these premises are correct, then it follows, on the principles above shown to be settled beyond controversy, that the Congress may in its discretion organize corporations by general or by special act to aid, assist and facilitate the execution of this express power. Such national post-road corporations would be like the Second Bank of the United States and the existing national banks, as described in the language of the Supreme Court in Davis *vs.* Elmira Savings Bank, 161 U. S., 283: "Instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States."

If it should be claimed that these corporations could be authorized only to construct and maintain these national post roads, and to carry only the mails, property, and officials of the United States, and that they could not be authorized to deal with individuals in the transportation of persons and property, the answer is two-fold: First, that having itself the right to permit the use of such roads and to charge tolls therefor in the event that it owned and operated them, it can transfer such right to its own agents and instrumentalities; Second, that just as the power to deal in money, notes and bills of exchange with individuals for its own profit all over the United States was essential in the opinion of the Congress and of the Supreme Court of the United States, to the proper, efficient and beneficial performance of the duties and functions of the Bank of the United States, as the fiscal agent of the Government, just so the power to deal in transportation must be held to be essential to the proper, efficient and beneficial operation of national post-road corporations. The unchallengeable reasoning of Chief Justice Marshall

in Osborn *vs.* U. S. Bank settles this proposition. That reasoning is too closely knitted together to be severed and too long to be quoted here. No valid distinction can be drawn between the vital necessity of the right to trade in money to a fiscal instrumentality of the Government, and the vital necessity of the right to trade in transportation to a transportation instrumentality of the Government. If a bank is created to operate as the fiscal agent of the Government and is permitted to have but one customer, the Government itself, it is manifest that it would be lame and impotent for the purposes of its organization, unless that one customer should submit to the inconveniences due to the restrictive sphere of its agents' operations and pay such an enormous price for the services performed for it, as to make the burden of supporting the bank fall entirely on its shoulders. So, if a post-road corporation is created to operate as a postal transportation agent of the Government, and is permitted to have but one customer, the Government itself, the cost of transportation to the Government would be so great and possibly the extent, celerity and efficiency of the service so defective, as to defeat the object for which the agency was created. The Federal Government has and must have the power to carry out to a perfect consummation all the great exclusive, express powers granted to it by the Constitution for national purposes. In regard at least to those exclusive, express powers, even the strictest constructionist concedes that it is undoubtedly sovereign, undoubtedly supereminent, and expressly authorized in the Constitution to make all laws necessary and proper to carry them into execution. What is necessary and proper for that purpose is left to the discretion of the Congress. There never has been, and, in my opinion, there never will be any departure from the rule of construction laid down by the great Chief Justice in McCulloch *vs.* Maryland, who said:

"The sound construction of the Constitution must allow to the National Legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution are constitutional."

The power "to establish post-offices and post-roads" is a broad, unlimited and unrestricted grant. It is confined only by those limitations in the Constitution which apply to all the granted powers of the Government.

The powers contained in this grant are fundamentally different from those vested in the Continental Congress by the Articles of Confederation. The post-office power under the Confederation was strictly an interstate power, an exclusive power "of establishing and regulating post-offices from one State to another throughout all the United States." Arts. of Confederation, Art. 9. To each State was left the right to regulate its own internal postal system, with its details of post-offices, post-roads, postal transportation and postal charges. The genesis of the grant as it now stands appears in the proceedings of the Convention of 1787. In Pinckney's proposed draft of a Constitution, which, together with all the general resolutions, presented and not considered, and presented and adopted, was referred to the Committee of Five, there were two distinct clauses, one granting power "to establish post-offices," and one granting power "to establish Post and Military roads." In the draft of the Constitution reported by the Committee of Five on Aug. 6th only the grant "to establish post-offices" was retained. On Aug. 16th the words "and post-roads" were added on motion of Elbridge Gerry. There appears to have been no debate on this addition (at least none is reported by

Madison), though it was carried by only six States to five. Elliot's Debates, Vol. 1, p. 245; The Madison Papers, 1343.

At a later date, Sept. 14th, after the report of the Committee on Style had been presented, Benjamin Franklin moved to add after the words "post-roads" a power "to provide for cutting canals where deemed necessary." This motion was seconded by James Wilson. Madison suggested an enlargement of the motion into a power "to grant charters of incorporation where the interest of the United States might require, and the legislative provisions of individual States may be incompetent." In support of this amendment he said: "His primary object was, however, to secure an easy communication between the States, which the free intercourse now to be opened seemed to call for. The political obstacle being removed, a removal of the natural ones as far as possible ought to follow." Franklin's motion being modified at the suggestion of Madison and Col. Mason so as to make it cover a power to grant letters of incorporation of canals alone, it was lost. Elliot's Debates, Vol. 1, p. 310; The Madison Papers, p. 1576-7. I submit that the substance of Franklin's amendment, the clause in the Constitution of which it was to make a part and to which it was supposed to be germane, and the discussion had on it, show clearly that the framers of the Constitution understood that the power "to establish post-roads" meant the power to construct and operate them.

The only mention made of the post-road power in the *Federalist* is contained in No. 42, by Madison, who says:

"The power of establishing post-roads must in every view be a harmless power, and may perhaps by judicious management become productive of great public conveniency. Nothing which tends to facilitate intercourse between the States can be deemed unworthy of the public care."

How could such a power be used so as to be "productive of great public conveniency," and how could it tend to

"facilitate intercourse between the States" if it was exhausted by designating the roads, made and maintained by the States, or their grantees, as post-roads on which mail carriers might transport the mails, and did not extend, in the fullest measure, to the construction and maintenance of postal highways by the Federal Government itself, or its grantees.

The grant as it stands to-day in the Constitution is now conceded to be excluive in its nature. No postal power whatever remains in any of the States. As stated by the Supreme Court of Kentucky in the Dickey case, *supra*, and by the Supreme Court of the United States in the Rapier case, *supra*, the grant was a complete grant of all the power on that subject theretofore resident in the States, inclusive even of the police power, to the extent necessary to make the grant effective.

It is a grant for national purposes, and, as said by Judge Story, must be treated from the national point of view. That it has not been heretofore exercised to its full extent is no argument against its scope or its national character. If the people, in the Congress assembled, believe it to be wise to use this broad grant to establish a government postal bank, a government postal telegraph, or a government postal express by land or water or both, and to permit the people, even as Congressmen, under the franking privilege, have been known to do under the existing system, to send their pianos, household furniture and laundry through the mails, they have, I submit, the undoubted constitutional power so to do.

They have already set up the postal money-order system, which the strict constructionists might say is void because essentially a domestic exchange business. They have already laid the beginnings of the parcels post, by authorizing packages of merchandise, not weighing over four pounds, to be carried as mail matter, which the strict constructionist might also say is void because essentially a freight-carrying business.

Having all these powers, and discretion as to how they shall be exercised, and having the undoubted power to create corporations as instrumentalities to facilitate the execution of its powers, it appears to me that the conclusion is irresistible that the Federal Government has the right to establish national post-road corporations and to give them power to deal in the transportation of persons and things as a convenient, appropriate, efficient and hence necessary and proper means to accomplish the purpose for which their Governmental instrumentality is established.

This power to deal in transportation would not be derived from, nor be based upon, nor have any connection with, the interstate-commerce power of the Constitution, and therefore would not be bound by the limitations on that power.

The limited power of the Congress over interstate transportation, as the vehicle and instrument of interstate commerce, would not prevent the exercise of power over transportation as auxiliary to the express power to establish post-offices and post-roads. The principle that "power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive" was laid down in U. S. *vs.* Marigold, 9 How., 560, and was formulated by the Court as above quoted in the Legal Tender Cases, 12 Wall., 544. (See also Shollenberger *vs.* Brinton, 52 Penn. St., p. 64.)

The claim that these national post-road corporations, with the powers suggested, would infringe upon the reserved rights of the States is without foundation. If the broad, exclusive, national grant is in the Constitution, how can there be any question of infringement on the reserved powers of the States? The reserved powers are those not granted at all. There is no just reason why State highways, and State corporations to build and operate State highways, and Federal postal highways, and

Federal corporations to build and operate Federal postal highways, could not co-exist in the same territory just as State banks and national banks exist, side by side, in the same cities and towns, competing with each other for the banking business of the people, interchanging business with each other, and acting together in matters pertaining to their mutual interests, as, for instance, in clearing-house associations. Of course, the power of the States to control these national post-road corporations would be limited, but the same limitations exist on the power of the State to control the national banks, or any other instrumentality of the Federal Government. These national post-road corporations may have many advantages over State transportation companies, just as the national banks may have many advantages over State banks, but these advantages are not only not an argument against their existence, *but the very strongest argument for their creation.* The superior advantages of the national banks over the existing State banks were conceived to be so great when the national banking system was created that provision was made in the National Banking Act whereby all State banks could transmute themselves into national banks. In Casey *vs.* Galli, 94th U. S., 673, it was held that no consent of the State, under whose laws a banking company was organized, was necessary to enable it to change its charter from a State to a Federal charter, because "it was as competent for Congress to authorize the transmutation as to create such institutions originally." On the same principle it would be competent for the Congress to authorize all State transportation companies, engaged in carrying the United States mails on post routes, adopted and designated as such by the Congress, to surrender their State charters and become national post-road corporations. Such change of corporate existence would have to be entirely voluntary, and could not, of course, be compelled

by the Congress, but a strong compelling power would lie in the Congress by a provision that none but a Federal post-road corporation should carry the mails.

But, it is excitedly exclaimed, by those whose amusement and profit it is, in some of the States, to bait the transportation companies like bears, and, under the pretense of reasonable regulation and taxation, practically to confiscate their property and franchises, if you give the State transportation companies any such opportunity they will all grasp it, and the States will lose control of all the existing highways now owned and controlled by such State corporations! What if they do? Is their power affected to build or to authorize the building of others? Are their just powers and privileges in any way injured or diminished? Did not such an exodus from State authority take place of State Banks under the National Banking law? Has the general welfare of the people of any State or of the aggregate people of the Nation been thereby injured? From my point of view this exodus of State transportation companies from State authority and their incorporation under Federal authority is the very point to be accomplished by the establishment of the national post-road system.

The transportation problem in these United States is one which most intimately affects the convenience, the comfort, the health and the prosperity of all the people. The artificial highways of the nation have long ago exceeded in number and in importance the natural highways which have already passed entirely under Federal control. These artificial highways are nearly all linked together in one great connected system like the arteries and veins of the human body, and ought to function in some similar way. They are now subject to the discordant control and regulation of forty-five different independent legislative sovereigns, some conservative, some viciously radical. In some of these it is claimed that the transportation corporations dominate the Legislatures,

and are too strong for the people to handle. In others it is well known that the transportation companies are worse than pariahs, and are treated as such. The American people have fourteen and a half billions of capital invested in these great corporations. Their securities form the main investment of educational institutions, insurance companies, savings banks, trust companies, trust estates and thousands of persons whose fortunes are involved in the integrity of these securities. The notion that the bulk of these securities are owned and controlled by half a dozen criminal millionaires, is a falsehood taught and propagated by yellow journalism, the strongest ally of anarchy and socialism.

Wolfe's Investment Directory of Insurance Companies for 1906 shows that the 339 insurance companies covered by that directory alone, held in June of that year $1,189,677,000 of the par value of railroad stocks and bonds. The last report of the New York Life Insurance Company shows an investment of $271,000,000 in such securities. The statistics for other institutions are not available to me at this time, if at all. An educational institution of which I am an administrator has more than $2,000,000 so invested. A high official of the Atchison system has assured me that their stock records show that the average holdings of their preferred stock is eighty shares, and of their common stock one hundred and fifty shares. The records of the other regular dividend payers will doubtless show similar results. I suggest that complete statistics on this subject might be gathered by the Census Department, and that their dissemination might tend to produce conservatism in quarters where it is needed.

Great abuses have arisen in the issuance and manipulation of the stocks and bonds of these great transportation companies. Other great abuses have arisen in the treatment of the public by these companies; and other abuses equally great have arisen in the treatment of these companies by the public.

The American people want all these abuses stopped, and by some means short of Government ownership, which some of them favor, but which most of them justly repel. I believe, and I think most of them believe, that the united strength of the whole nation is alone competent to effect the desired results, and therefore that any plan that can be devised, consistent with the Constitution of our country as interpreted by its lawful expounders, which will bring all transportation by land and water under the strong arm and the vigilant eye of the Federal Government, is a "consummation devoutly to be wished."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. [redacted]206

RAILROAD COMMISSION OF WISCONSIN, ET AL.,
Appellants,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

BRIEF AMICUS CURIAE OF THE STATE OF MINNESOTA.

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State Capitol, St. Paul, Minnesota.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 694.

RAILROAD COMMISSION OF WISCONSIN, ET AL.,
Appellants,

vs.

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

BRIEF AMICUS CURIAE OF THE STATE OF MINNESOTA.

STATEMENT.

This brief is presented in behalf of the State of Minnesota because similar proceedings have been brought against Minnesota state officials in which similar interlocutory injunctions have been issued, and also because the questions involved are of such vital concern as affecting the rights of states to continue to regulate their internal affairs.

ARGUMENT.

1. THE PURPOSE OF THE INTERLOCUTORY INJUNCTION IS NOT TO PRESERVE THE STATUS QUO IN EFFECT WHEN THE SUIT WAS COMMENCED.

It is first to be observed that the purpose of the temporary restraining order and of the interlocutory injunction granted in this suit was not to preserve the status quo, existing at the time the complaints were filed. It was instead to tie the hands of the state officials while an entire new system of intrastate passenger rates was put into effect. There was thus lacking, at the outset, the reason usually existing where this extraordinary power is exercised.

It would have been more in accordance with the principles governing the issuance of temporary injunctions to have applied the same against the action of the carriers in attempting to increase the intrastate passenger fares above the three-cent rate prevailing when the complaints were filed.

2. THE INCLUSION OF INTRASTATE VALUES IN THE AGGREGATE VALUES FOUND IN EX PARTE 74 WAS NOT AUTHORIZED BY SECTIONS 15-a (2) AND (3) OF THE ACT TO REGULATE COMMERCE.

The present extraordinary rate situation, over which so many states are now concerned and in which they are involved in litigation, had its origin, we believe, in a misinterpretation by the Interstate Commerce Commission of sections 15-a (2) and (3) of the Act to Regulate Commerce.

Those sections furnished the authority upon which the Commission acted in the advance rate case known as Ex Parte 74 and are as follows:

"(2). In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation; Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreason-

able, and to prescribe different rates for different sections of the country.

"(3). The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation; Provided that during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per cent of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account."

Before pointing out what we believe to have been an erroneous application of these sections, attention is called to the fact that section one of the Act still contains the following provision:

"(2) The provisions of this Act * * * shall not apply—

"(a) To the transportation of passengers or property, or to the receiving, delivering, storage or handling of property, wholly within one state and not shipped to or from a foreign country or to any place in the United States as aforesaid."

The scope of this provision embraces the whole Act and thus confines the primary jurisdiction of the Commission, at least, to interstate rates. That it was intended by Congress to apply to proceedings instituted under Sections 15-a (2) and (3) is shown by the opening clause of Section 15-a (2) that the rates to be established thereunder are to be established by the Commission "in the exercise of its power to prescribe just and reasonable rates."

Under Section 15-a (2) the commission was directed to find the "aggregate value" of the carriers' property, to estimate the "fair return" upon such aggregate value, and to establish rates which would produce such fair return. The fair return was fixed by Section 15-a (3) during the ensuing two-year period at six per cent, so that the commission's immediate duty consisted only in finding the aggregate value and establishing rates which would produce a net return of six per cent thereon.

The aggregate value and the rates to be established were thus so closely associated that the determination of the value carried with it the duty

under the Act of establishing rates which would yield a net return of six per cent thereon.

If the Commission was required to include in such aggregate value the proportion of the carriers' property devoted to intrastate transportation, then it was also required to establish rates which would yield six per cent upon such proportion, as well as upon the proportion devoted to interstate transportation.

This it did not do. It included both interstate and intrastate property in the aggregate value and estimated the sums which would have to be collected to produce six per cent thereon. It then determined what rates, if applied both interstate and intrastate, would produce the same. But it only ordered such rates to be applied in interstate commerce.

This left the fair return which the Commission was required to secure to the carriers, in the proceeding instituted under Sections 15-a (2) and (3), short, upon their own calculations, by just the amount which such increased rates would produce if applied in intrastate commerce.

Having failed to establish rates which would produce the required fair return upon the aggregate value found, it seems apparent that the Commission erred, either in including the intrastate property in such value, or in failing to directly require such increased rates applied in intrastate commerce.

We believe that its error was in including the intrastate property in the aggregate value which

it used as a rate base. The provisions of Sections 15-a (2) and (3) were plainly designed, not to change the manner in which rates had theretofore been determined and prescribed, but to fix a standard for the aggregate of rates. The Commission was directed to take into consideration the prescribed fair return upon the aggregate value of the property when exercising its power to prescribe just and reasonable rates. It was not, however, authorized or directed to prescribe rates contrary to the well established principles governing the exercise of that power.

It is our contention that the principle stated in the Minnesota Rate Case (Simpson v. Shepard, 230 U. S. 352) is still controlling, and that, where the Commission is only authorized to prescribe interstate rates, a division of property values is necessary. Upon that point the court said:

> "When the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the state for intrastate transportation affords a fair return must be determined by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed. * * * The validity of the result depends upon the estimates of the value of the property within the state and the apportionment both of value and of expense between interstate and intrastate operations."

The failure to exclude the intrastate property from the aggregate values upon which the rates were based has a twofold bearing upon the state's contention in this case: First, because of the influence which it apparently had upon the Commission in its country-wide attempt to increase intrastate rates in these later proceedings; and, second, because of its effect on the validity of the resultant rates.

Upon the first point it is to be observed that after exercising its power, under Sections 15-a (2) and (3), which may be termed the revenue sections of the Act, the Commission had failed to produce the result required by Congress; that is to say it had failed to establish rates which would produce a net return upon the aggregate values which it found. As has been stated this deficit was equal to the amount which would be produced if the increased rates applied in interstate commerce were also applied in intrastate commerce. That this situation was not without its influence upon the subsequent action of the Commission in seeking to increase all intrastate rates to the level of the interstate rates is apparent.

3. THE 3.6 CENT INTERSTATE PASSENGER RATE WAS NOT LAWFULLY PRESCRIBED AND COULD NOT PROPERLY BE USED, EITHER FOR THE PURPOSE OF DETERMINING THE EXISTENCE OF DISCRIMINATION OR AS THE STANDARD OF REASONABLENESS OF THE SUBSTITUTED INTRASTATE RATES.

The particular rates involved in this case and in the similar cases now pending in many of the states are passenger rates. During the period of Federal control of railroads the Director General of Railroads, in the exercise of the war power, established a uniform rate of three cents per mile for both interstate and intrastate transportation. The carriers have contended, and most of the courts to which the question has been submitted have held, that the three-cent rate was continued in effect in intrastate commerce by virtue of the provisions of Section 208 (a) of the Transportation Act, 1920.

If that be the correct construction of the section mentioned, then the discrimination complained of in the instant and other similar pending cases, if it be discrimination, arose solely through the action of the Commission, in Ex Parte 74, in establishing the interstate passenger rate at 3.6 cents per mile.

It therefore becomes a pertinent subject of inquiry as to the manner in which the 3.6 cent rate was arrived at. It is first to be observed in that respect that in establishing the aggregate values

in Ex Parte 74, which were used as the rate base, not only was there a failure to separate intrastate and interstate values, but there was also a failure to separate passenger from freight values. The failure of the Commission in this respect was in direct conflict with the principle laid down in Simpson v. Shepard, supra, in respect to which the Court said:

> "When rates are in controversy, it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue, and this must be found in the use that is made of the property. That is, there should be assigned to each business that proportion of the total value of the property which will correspond to the extent of its employment in that business. It is said that this is extremely difficult; in particular, because of the necessity of making a division between the passenger and freight business, and the obvious lack of correspondence between ton-miles and passenger miles. It does not appear, however, that these are the only units available for such a division; and it would seem that, after assigning to the passenger and freight departments respectively, the property exclusively used in each, comparable use-units might be found which would afford the basis for a reasonable division with respect to property used in common. It is suggested that other methods of calculation would be equally unfavorable to the state rates, but this we cannot assume."

This failure to separate extended to expenses as well as to values.

The report and order in Ex Parte 74 show that the Commission has gone to this extent only, it has determined the amount necessary to produce six per cent upon the value which it placed upon the total property and has established freight and passenger rates interstate which, if also applied intrastate, would be expected to produce a net return of six per cent. Whether the freight or passenger rates will produce approximately six per cent upon the value of the property devoted to the particular service, or not, has not been determined and could not be determined in the absence of such separations.

Therefore the Commission has not determined and could not determine, in the absence of such separations, whether or not the passenger business is bearing a disproportionate share of the burden. It has not been ascertained whether the 3.6 cent passenger rate will produce two per cent, or ten per cent, or the required six per cent, upon the value of the property devoted to such service. Such ascertainment has not been made as to the carriers as a whole, or in groups, or as to particular carriers.

That the Commission was not unaware of this anomolous situation is shown by the complete failure on its part to find, in Ex Parte 74, that the 3.6 cent passenger rate was a reasonable one.

While it was quite apparently the intention of Congress to fix a standard of aggregate return there is no indication in the Transportation Act,

1920, of an intention to have rates established which would yield such return, but would violate so many of the established principles of rate making.

If it had been impossible for the necessary divisions to be made, there might be some basis for the claim that Congress, having required that the return should equal 6 per cent, intended that it should be produced without regard to the reasonableness of particular rates. It is, however, difficult to see how such a contention could seriously be advanced, in view of the fact that the only authority to prescribe rates which will produce such return is preceded by the statement that it shall be done "in the exercise of its power to prescribe just and reasonable rates."

Such divisions have often been made heretofore and doubtless could be made again. That they are difficult to make and would require considerable time is no valid reason for not making them. This was pointed out in the case of Simpson v. Shepard, supra, and is in accordance with the decision of the Supreme Court of the United States, in the case of United States ex rel. Kansas City Southern Railway Company v. Interstate Commerce Commission, 252 U. S. 178.

Not only was the failure to exclude the intrastate values and to separate passenger and freight values contrary to the principles stated by the Supreme Court, but we submit that it was entirely unauthorized by, and in fact contrary to, the quoted portion of the very section of the law under

which it was acting. For these reasons we contend that the 3.6 cent interstate passenger rate was not lawfully prescribed and could not properly be used, as it has been used in the instant case, either for the purpose of determining whether the existing disparity between interstate and intrastate rates constitutes discrimination, or as a standard of reasonableness for the substituted intrastate rates.

4. THE ORDER OF THE INTERSTATE COMMERCE COMMISSION WAS NOT AUTHORIZED BY SECTION 13 (4) OF THE ACT TO REGULATE COMMERCE.

Soon after authorizing increases in interstate rates, in Ex Parte 74, the Commission commenced its country-wide effort, of which the instant case is an outgrowth, to increase all intrastate rates to the level of the increased interstate rates. Proceedings, similar to the one in Wisconsin, were instituted in nearly all, if not all, states where the intrastate rates were not raised by state authority to the level of the interstate rates.

This it did not do, under the authority of Sections 15-a (2) and (3), the revenue sections, but it predicated its action upon section 13 (4), the discrimination section. It thus sought to secure to the carriers the full six per cent upon the aggregate values found in Ex Parte 74, which it had failed to do in such proceeding.

Our purpose in directing attention to the particular sections of the law under which the Commission was acting in these proceedings is this. It has, in effect, assumed complete jurisdiction over intrastate rates. If such authority was conferred upon it at all, which we deny, it was by sections 15-a (2) and (3), the revenue sections. If such authority had been directly exercised under those sections the issue would have been sharply raised and could have been brought to this court for determination. The fact that its action is based on section 13 (4), the discrimination section, but obscures the issue. Nevertheless the assumption of complete authority is plain, even though it be under the guise of removing discriminations.

We contend that it was beyond the power of Congress, under the Constitution, to confer this broad power over intrastate rates upon the Commission, but will not argue the point inasmuch as it is completely covered in other briefs. We will, however, try to show that Congress has not attempted to confer this power upon the Commission by the section under which it was acting.

Section 13 (4) is as follows:

> "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any un-

due, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner, as, in its judgment, will remove such advantage, preference, prejudice, or discrimination."

We contend that this section did not render unlawful anything that was not already covered by the old law.

The following provisions were in the Act to Regulate Commerce at the time the so-called Shreveport Case (Houston E. & W. Ry. Co. v. United States, 234 U. S. 342) and the case of Simpson v. Shepard, supra, were decided:

"Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of dis-

crimination, which is hereby prohibited and declared to be unlawful.

Sec. 3. (1). That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, or corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Sections 2 and 3 specifically rendered unlawful undue preference to certain persons and undue prejudice to others. Did they also render unlawful "unjust discriminations against interstate commerce?" In the opinion of the Interstate Commerce Commission they did, for it said in the case of Memphis Merchants Exchange v. I. C. R. R. Co., 43 I. C. C. 378, on page 387.

> "it is now well settled by decisions of this commission and the courts that if rates approved by state authority cause undue discrimination against interstate commerce, it is the duty and within the power of this commission to require the removal of the discrimination without at the same time requiring the reduction of reasonable interstate rates."

Undoubtedly the commission's view was correct, as the decisions of the Supreme Court in the so-called Shreveport Case, supra, and in American Express Co. v. South Dakota, 244 U. S. 611, and in Illinois C. R. Co. v. Public Utilities Commission, 245 U. S. 493, will show.

If the commission's view was the correct one then the basis of its action, that is to say the matters forbidden by the Act were not at all enlarged by the addition of section 13 (4).

With the situation in that respect then, precisely the same as it is today, the Supreme Court said in the Minnesota Rate Case, Simpson v. Shepard, 230 U. S. 352:

> "Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable, or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for interstate rates, or prescribe or authorize the commission to prescribe, either maximum or minimum rates for intrastate traffic. *It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed*, or attempted to override the accustomed authority of the states without the provision of a substitute. On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the states and the agencies created by the states to deal with that subject." (Italics ours.)

It is to be noted that the express disclaimer mentioned is the provision of section 1 of the Act that it shall not apply to the transportation of property or passengers wholly within one state. This disclaimer is still in the act.

The meaning of the term "unjust discrimination against interstate commerce" should be gathered from the decisions above mentioned since Congress was not dealing with a new subject in enacting section 13 (4), but with a matter which had been passed upon repeatedly by the Supreme Court.

In the original Shreveport case, supra, the following statement was made:

> "It is undisputed that the difference was substantial, and injuriously affected the commerce of Shreveport," and, "The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for federal intervention. * * * Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes."

This language supports our contention that the term unjust discrimination against interstate commerce has reference to the traffic itself and not to the revenues derived by the carriers therefrom.

Under the law as it existed prior to the enactment of the Transportation Act, 1920, the commission therefore had authority to require the removal of undue preferences to certain persons, undue prejudices to others and unjust discriminations against interstate commerce.

It had, however, stated in the case of Memphis Merchants Exchange v. I. C. R. Co., supra:

> "However, the mere maintenance of a rate for movement of traffic wholly within a state lower than a rate found reasonable by this commission for the local state portion of a through interstate movement does not of itself constitute undue discrimination within the meaning of the act. * * * In a case which merely calls to our attention the fact that a state rate is lower than an interstate rate on the same traffic from and to the same points, we have no authority or power to condemn the state rate and take action which would be warrant to carriers to increase it to the level of the applicable interstate rate."

The Supreme Court also said, in Simpson v. Shepard, supra:

> "The decisions of this court since the passage of the act to regulate commerce have uniformly recognized that it was competent for the states to fix such rates, applicable throughout its territory. If it be said that in the contests that have been waged over state laws during the past twenty-five years, the question of interference with interstate commerce by the establishment of state-wide rates for intrastate traffic have seldom been raised, this fact itself attests the common conception of the scope of state authority and the decisions recognizing and defining the state power wholly refute the contention that the making of such rates constitutes a direct burden upon the interstate commerce *or is repugnant to the federal statute.*" (Italics ours.)

Section 13 (4) was added to the Act to Regulate Commerce in the light of the above decisions construing its then existing provisions. In adopting the very language of the decisions Congress should be held to have intended that the same meaning should be given to it. It seems to us that two points are clear; first, that 13 (4) added nothing to the prohibitions contained in sections 2 and 3, and, second, that neither section 13 (4) nor sections 2 and 3 were intended to be used as revenue producing sections.

The purpose of section 13 (4) was well understood in Congress to be, as expressed by Congressman Sanders on page 9150 of the Congressional Record for November 17, 1919, "writing into the statute a rule of procedure before the Interstate Commerce Commission in order to enforce the rule in the Shreveport case."

In the Report of the Committee on Interstate and Foreign Commerce of the House accompanying the original house bill, it was said, on page 20, in reference to the provision therein contained:

> "The provision practically enacts into law the decision of the supreme court in the so-called 'Shreveport case.'"

In the case of American Express Co. v. South Dakota, supra, the court in its opinion said:

> "The order properly left to the carrier's discretion to determine how the discrimination should be removed."

Congress evidently intended to modify this practice and to require the commission itself to determine the manner of removing the discrimination. That, we contend, was the only purpose of section 13 (4). It rendered nothing unlawful that was not already unlawful and only enlarged the commission's power to the extent that it authorized it to prescribe the rate to be used to remove the prohibited conditions instead of leaving that matter to the carriers.

It left the power subject to the limitation that the mere existence of rates upon different levels did not constitute a violation of the prohibitions and accordingly did not furnish a new basis for action by the commission.

Yet, proof of the existence of a difference in rate levels and the consequent deprivation of the carriers of revenue was the only proof touching all of the intrastate rates in Wisconsin. It would seem that if it was not of itself sufficient to justify the order the order could not be sustained. Aside from the fact that the issuance of its order upon such proof resulted in a complete reversal of its views as to what constituted undue preference and prejudice and unjust discrimination, it has rendered futile the provisions of section 13 that an investigation be held and that "the Commission, before proceeding to hear and dispose of such issues, shall cause the state or states interested to be notified of the proceeding." The issues have in reality been decided before the investigation was begun.

In so deciding the commission has applied the discrimination section to a use for which it was not intended and is not adapted. It has used a provision, which was designated for the protection of the shipper, as a means of producing revenue for the carriers. It has exercised as complete an authority over intrastate rates as it possesses over interstate rates, notwithstanding the fact that Congress could not constitutionally and has not conferred such authority upon it.

It has acted without regard to the decision of the Supreme Court in the Party Rate Case, 145 U. S. 263, 276, wherein the court said:

> "It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust and unreasonable; * * * indeed the possibility of just discrimination and reasonable preference is recognized by those sections in declaring what shall be deemed unjust."

In thus committing itself in advance of the hearing as to its decision the commission has acted without regard to the decision of the Supreme Court in the case of Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, in which the court said:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony and at the same time imposed the duty of deciding in accordance with the facts proved."

For these reasons we contend that the action of the Interstate Commerce Commission in purporting to order carriers to raise intrastate rates in Wisconsin was arbitrary, without authority of law and was entirely null and void.

THE RESULTANT RATE SITUATION IF THE ORDER OF THE COMMISSION IS SUSTAINED.

The resultant situation, if the Commission's action in this and similar proceedings is sustained, deserves attention. The interstate rate of 3.6 cents is purely permissive. The carriers are at liberty to lower it when they desire. The intrastate rate ordered in by the Commission is mandatory. It cannot be lowered at the carrier's discretion.

It is questionable if such lowering could be compelled even though the interstate rates are lowered. This is so because the chief ground relied upon by the carriers, in seeking to have the intrastate rate raised, was that it caused an "unjust discrimination *against* interstate commerce." The provisions of section 13 (4) of the Act conferring power upon the Commission to remove "any undue, unreasonable, or unjust discrimination *against* interstate or foreign commerce" was the one which it was contended so enlarged the scope of the Commission's jurisdiction.

This provision is obviously unavailable to secure the lowering of intrastate rates even though they

are higher than the interstate rates because that condition would not constitute a discrimination *against* interstate commerce, but would rather be in its favor.

Therefore, if the Commission's construction of its power, in this and similar cases is sustained, the country will be confronted with the anamalous situation of having its intrastate rates permanently fixed by Federal authority without the power in either the states, the Commission or the carriers to change them from time to time to meet existing conditions, even though the interstate rates are lowered.

We submit that Congress cannot be supposed to have intended the creation of such a situation, and that if it did it is clearly in violation of the Tenth Amendment to the Constitution of the United States.

Conclusion.

For the reasons above stated it is respectfully submitted that the order of the district court granting the interlocutory injunction should be reversed.

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Supreme Court of the United States

OCTOBER TERM, 1920.

No. 694—In Equity.

RAILROAD COMMISSION OF WISCONSIN, and CARL D. JACKSON, H. R. TRUMBOWER and JOHN S. ALLEN, as members of and constituting the Railroad Commission of Wisconsin; JOHN J. BLAINE, individually and as Attorney General of the State of Wisconsin; FRANK C. MEYER, individually and as District Attorney of Grant County, State of Wisconsin, *Appellants*,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

Brief filed Amici Curiae on Behalf of Forty-two States by the Attorneys General and Other Counsel and by their Railway and Utilities Commissions.

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Public Utilities Commission of Idaho,
Public Utilities Commission of Illinois,
Public Service Commission of Indiana,
Board of Railroad Commissioners of Iowa,
Court of Industrial Relations of Kansas,
Railroad Commission of Kentucky,
Railroad Commission of Louisiana,
Public Utilities Commission of Maine,
Public Service Commission of Maryland,
Michigan Public Utilities Commission,
Railroad and Warehouse Commission of Minnesota,
Railroad Commission of Mississippi,
Public Service Commission of Missouri,
Board of Railroad Commissioners for the State of Montana,
State Railway Commission of Nebraska,
Public Service Commission of Nevada,
Public Service Commission of New Hampshire,
Board of Public Utilities Commissioners of New Jersey,
New Mexico State Corporation Commission,
Public Service Commission of New York (1st District),
Public Service Commission of New York (2d District),
Corporation Commission of North Carolina,
Board of Railroad Commissioners of North Dakota,
Public Utilities Commission of Ohio,
Corporation Commission of Oklahoma,
Public Service Commission of Oregon,
Public Service Commission of Pennsylvania,
Railroad Commission of South Carolina,
Board of Railroad Commissioners of South Dakota,
Railroad Commission of Texas,
Public Utilities Commission of Utah,
Public Service Commission of Vermont,
State Corporation Commission of Virginia,
Public Service Commission of Washington,
Public Service Commission of West Virginia,
Railroad Commission of Wisconsin,
Public Service Commission of Wyoming.

By JOHN E. BENTON,
General Solicitor, National Association Railway and Utilities Commissions.

PRELIMINARY.

The state officials, parties to this brief, filing the same by leave of court, do so *amici curiae* only, except the Railroad Commission of Wisconsin. It is perhaps fitting that they should at the outset state the reasons which impel them to file it.

INTEREST OF ATTORNEYS GENERAL AND OTHER STATE COUNSEL.

The attorneys general and other state counsel represent all of the states to which the Interstate Commerce Commission has yet given notice of proceedings looking toward orders advancing intrastate rates. Their reasons for filing this brief may be shown by including a statement issued by them at a conference in Washington, D. C., February 16-17, 1921, at which they determined to ask leave to file the same. The statement follows:

"The attorneys general and other state counsel severally represent states whose sovereign rights to regulate their own internal commerce, and the rates and charges imposed upon the public for transportation of the same, have been already invaded, or are now threatened with invasion, under the Transportation Act of 1920. It is their duty to enforce the laws of their respective states, and to protect their peoples in the enjoyment of those rights and powers which were reserved to each state under the federal constitution.

They believe that the Transportation Act of 1920, under which the Interstate Commerce Commission claims to exercise power to set aside state statutes, and orders, rules and regulations in force under state

laws, ought to be declared unconstitutional for the following among other reasons:

1. As construed by the Commission, it is destructive of our dual form of government and contrary to the spirit of our institutions. From the very formation of the government there has been no question as to the constitutional right of the people of the several states to control purely intrastate traffic. This principle was upheld by John Marshall and has been uniformly admitted by all the courts of the United States to this time. The construction placed upon the Transportation Act, if sustained by the Supreme Court in the Wisconsin case, will overturn this established principle of constitutional law, and will centralize in a body of eleven men sitting in Washington power over the entire commerce of the United States, both interstate and intrastate.

2. It prescribes a fixed return on railroad capital regardless of business conditions. Under such a law, if prices fall and traffic grows less, railroad rates increase. The Commission is commanded to make rates that will yield a fixed return without regard to the value of the transportation service rendered. This is not only economically unsound, but it is violative of fundamental law.

3. It commands the Commission under the group plan to fix an aggregate value and make rates that will yield in the aggregate the fixed return thereon. The worthless roads of the country, ill-considered ventures, duplicated lines, speculative enterprises, roads that have served their useful purpose and outlived the industries which once justified their construction—roads that perform no sufficiently useful service in the actual

movement of traffic to enable them to earn—are valued with the good, and the roads that can earn, because they are the highways of commerce and traffic, must move over them, if it moves at all, regardless of the rate imposed, are given by this law the right to earn on their own value and the value attributed to other roads as well. In the exact words of the Act, this will enable such carriers "to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property." One-half of the unreasonable excess is to be taken by the government, to be loaned to carriers or expended for equipment to be leased to them. The half that the government thus takes is an unjust tax to be expended for a selected class. The half that carriers are permitted to keep is in excess of the fair return they are entitled to by the common law. Both the half which nominally goes to the government and the half that the carriers keep represent an excess burden laid on shippers, whose right to a fair rate under the constitution is equal to the carrier's right to a fair return on its property. Because the law aims to compel the Commission to disregard this right it violates again the fundamental law.

For these and other reasons the public officials, parties hereto, deem it their duty, in the first case to come before the United States Supreme Court involving the Transportation Act, to challenge both the construction which the Commission has placed upon the Act and its constitutionality as well."

INTEREST OF STATE REGULATORY COMMISSIONS.

The state regulatory commissions joining in this brief seek to preserve power to serve the people of

their respective states in the manner prescribed by their laws. The Transportation Act of 1920, as construed by the Interstate Commerce Commission, hereinafter called the Commission, destroys the power of such commissions, and of the legislatures of their states as well, to regulate intrastate commerce.

Already the Commission has made state-wide orders dispossessing the states of New York, North Carolina, South Carolina, Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota, Nebraska, Arkansas, Montana and Utah of power over substantially all passenger fares. Like orders have been made covering freight rates in the states of Indiana, Illinois and Nebraska. The Commission has also instituted proceedings looking towards like orders with respect to freight rates or passenger rates, or both, in the states of Georgia, Alabama, Florida, Missouri, Kansas, Louisiana, North Dakota, Texas, Nevada and Arizona. The orders made by the Commission, by the provisions of the act, and by the express terms of such orders, are "to remain in force until the further order of the Commission." (Record, p. 51.) Such orders, therefore, in their operation, are not confined to the removal of discriminations existing at the time of the making of the orders, leaving in existence state power thereafter to regulate rates upon the traffic affected, but result in the permanent destruction of all state power over such rates.

While these orders of the Commission thus far made under the Transportation Act relate to passenger fares and freight rates only, it may be said that all power of regulation is involved. Section 13 (4) of the Interstate Commerce Act, as amended by the Transportation Act, under which the orders of the Commis-

sion have been made, authorizes action with respect to any "rate, fare, charge, classification, regulation or practice" which causes "undue, unreasonable or unjust discrimination against interstate commerce." If it shall be held in this case that the Commission can find a rate prescribed by state law discriminatory, and make an order setting the same aside, because in the opinion of the Commission it is too low, and so burdensome to interstate commerce, it will be claimed that the Commission may make a like finding and order as to any regulation requiring the provision of terminal or station facilities, or the furnishing of equipment, or the making of improvements to safeguard life, or the doing of anything that requires the expenditure of money; and thus, if that claim shall be sustained, the power to regulate carriers in any respect, as to their intrastate operations, will be found to have been transferred from the states to the federal government.

The state regulatory authorities joining in this brief, therefore, believe it to be their duty to press upon the attention of the court the revolutionary character of the power which the Commission has attempted to exercise in this case, and to urge that no such construction as the Commission has placed upon the Transportation Act can have been within the intent of Congress, and, further, that if such construction can be held in accord with such intent, then the Act is unconstitutional, as an invasion of the reserved power of the states under the federal compact.

ITALICS IN QUOTATIONS.

The italics in quotations contained herein are our own.

PART I.

STATEMENT OF FACTS.

On November 27, 1920, the Interstate Commerce Commission made a report as follows:

REPORT OF THE COMMISSION.

In Ex Parte 74, *Increased Rates, 1920,* 58 I. C. C., 220, we authorized increases to be made by all steam railroads subject to our jurisdiction in the group which serve the State of Wisconsin. These increases within that group were 35 per cent in interstate freight rates; 20 per cent in interstate passenger fares and charges, excess baggage charges, and rates on milk and cream; and also a surcharge upon passengers in sleeping and parlor cars amounting to 50 per cent of the charge for space in such cars, to accrue to the rail carriers. Increased rates, fares, and charges pursuant thereto were established, effective August 26, 1920.

Prior to our decision of July 29, 1920, in *Increased Rates, 1920, supra,* the carriers by steam railroad operating in the State of Wisconsin had applied to the railroad commission of that state, hereinafter referred to as the Wisconsin commission, for permission to make increases in their intrastate rates, fares, and charges similar to those which should be authorized by us on interstate traffic. Hearings were held by the Wisconsin commission, and all of the evidence before us in Ex Parte 74 was made part of the record before it. In so far as the applications related to charges for freight service and rates on milk and cream, they were granted, with exceptions not here material, by report and order of the Wisconsin commission dated August 16, 1920, and the increases became effective August 26, 1920, contemporaneously with the increases in interstate rates and charges. Increases in intrastate passenger fares and excess-baggage charges, and the surcharge upon intrastate passengers in sleeping and parlor cars, were not allowed. A 20 per cent increase on intrastate commutation fares was also granted by the Wisconsin commission, with the pro-

viso that such fares should not exceed the fares provided for in section 198a of the Wisconsin statutes, hereinafter referred to. In denying increased passenger fares on intrastate traffic the Wisconsin commission said:

> The Railroad Commission of Wisconsin was created by an act of the legislature of 1905 and by that act was given jurisdiction to fix and determine reasonable passenger fares on intrastate traffic on railroads in the State of Wisconsin. It exercised this jurisdiction in 1907, fixing a cash fare rate of two and one-half cents per mile. In 1907, the legislature passed an act known as Section 1798a as follows:
>
> "No corporation operating a railroad in this state, the gross receipts of which are or exceed three thousand five hundred dollars per mile per annum, shall demand, collect or receive a greater compensation for the transportation of persons than two cents per mile; and every such corporation shall, at its ticket stations within this state on its lines of road, sell tickets at a price not to exceed two cents per mile, but no such corporation shall be compelled to accept a single fare of less than five cents."
>
> This section was applicable to all of the larger lines in Wisconsin and was observed by them until the period of federal control. During that period, all passenger fares, both interstate and intrastate, were advanced to a basis of three cents per mile, such rates becoming effective about June 10, 1918, and being in effect February 29, 1920.
>
> Since the passage of the two cent fare act, this Commission has been without jurisdiction over passenger fares on the lines specified in excess of two cents. In our opinion, we are still without such jurisdiction and cannot approve any tariffs in violation of that act.

* * * * * *

> The sole question decided here is the jurisdiction of the Commission. The application of carriers in this respect is denied.

Thereafter certain carriers by steam railroad operating in Wisconsin filed with us a petition, later amended, on their own behalf and on behalf of all steam railroads operating in that state, for relief in accordance with the provisions of section 13 of the interstate commerce act. This proceeding, to which all railroads subject to our jurisdiction operating in the State of Wisconsin have been made parties respondent, was then instituted, on our own motion—

> to determine whether the rates, fares and charges required by authority of the State of Wisconsin to be maintained by said railroads, cause or will cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce; and as to what rates, fares and charges, if any, or what maximum or minimum or maximum and minimum, shall be prescribed to be charged by the petitioners, in order to remove such advantage, preference, prejudice, or discrimination, if any, as may be found to exist.

At the present time 3 cents per mile is the basis, initiated by the President, for intrastate passenger fares in Wisconsin, as the enforcement of the state 2-cent fare law has been temporarily restrained by an order of the United States District Court for the Eastern District of Wisconsin pending hearing on its merits of an application made by the respondent carriers seeking a permanent injunction. The interstate passenger fares in the region that includes Wisconsin are in general on a basis of 3.6 cents per mile as maximum. Evidence offered by the carriers indicates that if the present intrastate fares are continued for one year and if there is the same intrastate travel during that

year as in the calendar year 1919, the direct loss to the carriers due to their failure to secure the 20 per cent increase in intrastate fares will approximate $2,400,000, and if the 2-cent intrastate fare should become effective the loss would be approximately $6,000,000.

All of the respondents carry both state and interstate passengers on the same trains with the same service and accommodations. The state passenger, paying the lower rate, rides on the same train, in the same car, and perhaps in the same seat, with the interstate passenger who pays the higher rate. A stipulation entered into between the respondents and the Attorney General and Railroad Commission of Wisconsin reads in part as follows:

> The parties to this stipulation agree that for the purpose of this record only it shall be considered that the operating conditions and transportation conditions are substantially the same for interstate as for intrastate passenger service, but that nothing in this stipulation shall be deemed an admission by the Attorney General of Wisconsin or the Railroad Commission of Wisconsin that the cost of intrastate passenger service that is performed within the confines of Wisconsin is either as great as or greater than the cost of interstate passenger service.

The lower Wisconsin state basis is said to affect localities outside the state. For instance, it is shown that Duluth, Minn., and Superior, Wis., which are in close proximity to each other, compete for locations of industries and for retail trade, and to some extent for wholesale trade. Passengers from Wisconsin can go to and from Superior on a basis of 0.6 cent per mile less than to and from Duluth; can entirely escape the surcharge; and can have their excess baggage transported without the additional charge of 20 per cent. The situation is said to be similar at Marinette, Wis., and Menominee, Mich.; Hurley, Wis., and Ironwood, Mich.; and at other border points.

The record contains many illustrations of the way in which the Wisconsin intrastate fares have the effect of reducing the earnings on interstate traffic, or rather on what would be interstate traffic if it were not for the differences in fares. Travelers destined to or coming from points outside the state find it cheaper to pay the intrastate fare within Wisconsin and the interstate fare beyond the border than to pay the through interstate fare. A witness for respondents testified that in the past when intrastate fares were on a lower basis than interstate fares this practice was very common and very hard to eliminate. He also testified that any condition that creates a lower level of rates intrastate than interstate can not be supported and that finally it is found necessary to reduce the interstate fares to the level of the intrastate fares.

As tending to show undue preference of or prejudice to localities, and that the through interstate fares are being defeated, respondents introduced an exhibit from which it appears that during the period August 1 to 14, 1920, inclusive, 1,367 tickets were sold from Marinette, Wis., to 12 stations in Wisconsin on the Chicago & North Western, while during the same period in September 2,021 tickets were sold, an increase of 47.7 per cent. During the same periods 479 and 357 tickets, respectively, were sold from Menominee, Mich., to the same stations, a decrease of 25.4 per cent. Marinette and Menominee are on opposite sides of the Menominee River. From Hurley, Wis., to 10 stations in Wisconsin on the Chicago & North Western, 713 tickets were sold during the period August 1 to 14, 1920, inclusive, and 964 during the corresponding period in September, an increase of 35.2 per cent. From Ironwood, Mich., a point directly opposite Hurley, to the same stations, 953 tickets were sold during the August period and 601 during the September period, a decrease of 36.9 per cent. During the period August 1 to 21, 1920, inclusive, the tickets sold and cash fares collected between Ashland, Wis., and Duluth, Minn., and between Ashland and

Superior, Wis., were 1,624 and 842, respectively. During the same period in September the figures were 1,280 and 1,152, respectively.

A direct result of the practice of buying passenger tickets again at or near state lines, thereby defeating the through interstate fares, is to convert, so far as the revenues of the carriers are concerned, interstate commerce into intrastate commerce. It also results, where there are two or more routes between two given points, in passengers using the route which has the longest mileage within the state carrying the lower intrastate fare. For example, a passenger from Milwaukee to St. Paul on the Chicago & North Western can purchase an intrastate ticket to Hudson, Wis., for $9.14 and an interstate ticket from Hudson to St. Paul for 70 cents, a total of $9.84. The passenger on the Chicago, Milwaukee & St. Paul who desires to pursue a like practice will purchase an intrastate ticket to La Crosse, Wis., for $5.91, and an interstate ticket from La Crosse to St. Paul for $4.77, a total of $10.68, or 84 cents higher than the combination via the Chicago & North Western. The through interstate fare from Milwaukee to St. Paul via both routes is $11.67.

What has been said with respect to passenger fares applies in like manner to the surcharge upon passengers in sleeping and parlor cars.

Inasmuch as the excess-baggage charges are arranged upon a scale bearing a fixed relationship to passenger fares and correspondingly graded in amount, such charges are governed by the passenger fares, and any discrimination in passenger fares necessarily entails a like discrimination in excess-baggage charges.

There is little or no evidence in the record as to the relationship of intrastate and interstate commutation or other multiple forms of tickets, excursion, convention, or other fares for special occasions, or club-car charges, and no finding will be made with respect thereto.

We deem it unnecessary to dwell upon the conten-

tions of the state authorities or of respondents for, in the main, they are the same as those considered by us in *Rates, Fares, and Charges of N. Y. C. R. R. Co.*, 59 I. C. C., 290, and *Intrastate Rates Within Illinois*, 59 I. C. C., 350.

The Attorney General of Wisconsin and the Wisconsin commission, in effect, adopt the brief filed in the New York case on behalf of the various state commissions.

As stated before, the present basis of intrastate fares in Wisconsin is that of 3 cents per mile initiated by the President through General Order No. 28 of the Director General of Railroads, effective June 10, 1918. At that time, and until the increase of 20 per cent in interstate fares authorized by our report in *Increased Rates, 1920, supra,* became effective on August 26, 1920, the basis of both intrastate and interstate fares was the same. The reasons for increase in interstate fares are set forth in our report last cited. They included the wage award then recently made by the Labor Board. The Wisconsin commission declares that it has no power to grant any increase. The record upon which we based our report and order in *Increased Rates, 1920, supra,* is a part of the record in this proceeding.

Following the New York and Illinois cases, and upon this record, subject to the exception above noted in respect to commutation or other multiple forms of tickets, excursion, convention, or other fares for special occasions, and club-car charges, we are of opinion and find that the increases made by the respondent steam railroads under Ex Parte 74, relating to passenger fares and baggage charges, and now in effect, result in reasonable passenger fares and excess-baggage charges for interstate transportation within the group considered in this proceeding, and that the failure of said respondents to increase the standard intrastate fares and charges correspondingly within the state of Wisconsin has resulted and will result in intrastate fares and charges lower than the corresponding

interstate fares and charges; in undue prejudice to persons traveling in interstate commerce within the state of Wisconsin and between points in the state of Wisconsin and points in other states; in undue preference of and advantage to persons traveling intrastate in Wisconsin; and in unjust discrimination against interstate commerce.

We further find that said undue prejudice and preference and unjust discrimination can and should be removed by making increases in said intrastate passenger fares and excess-baggage charges which shall correspond with the increases heretofore made by said respondents as aforesaid in interstate passenger fares and excess-baggage charges.

We further find that the surcharges made by said respondent steam railroads under Ex Parte 74 upon passengers in sleeping and parlor cars result in reasonable charges upon passengers so traveling in interstate commerce in the group considered in this proceeding, and that the failure of said respondents to make corresponding surcharges upon passengers so traveling in intrastate commerce within the state of Wisconsin has resulted and will result in intrastate charges lower than the corresponding interstate charges; in undue prejudice to persons so traveling in interstate commerce within the state of Wisconsin and between points in the state of Wisconsin and points in other states; in undue preference of and advantage to persons so traveling intrastate in Wisconsin; and in unjust discrimination against interstate commerce.

We further find that said undue prejudice and preference and unjust discrimination can and should be removed by making surcharges upon passengers so traveling in intrastate commerce which shall correspond with the surcharges heretofore made as aforesaid upon passengers so traveling in interstate commerce.

We further find that, whether the aforesaid passenger fares, excess-baggage charges, or surcharges

pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services in each instance are performed by the carriers under substantially similar circumstances and conditions. Tariffs may be made effective on not less than five days' notice.

These findings are without prejudice to the right of the authorities of the State of Wisconsin or of any other party in interest to apply in the proper manner for a modification of our findings and order as to any specified intrastate fares or charges on the ground that the latter are not related to the interstate fares or charges in such a way as to contravene the provisions of the interstate commerce act.

An appropriate order will be entered.

Upon this report the commission entered an order in part as follows:

> "It is ordered, That the carriers by steam railroad parties to this proceeding, * * * according as they respectively participate in the transportation be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination, found in said report, to exist in the relation of interstate and intrastate passenger fares and excess baggage charges, and to establish, put in force, and maintain passenger fares and excess-baggage charges, for the transportation of passengers and their baggage in intrastate commerce within the State of Wisconsin which shall exceed the fares and charges of said carriers now in force and applicable to such transportation in amounts corresponding with the increases heretofore made by said carriers and now in effect under Ex Parte 74, referred to in said report, in said carriers' passenger fares and excess-baggage charges for the transportation of passengers and their baggage in interstate com-

merce within the State of Wisconsin and between points in the State of Wisconsin and points in other States;

It is further ordered, That said carriers, according as they respectively participate in the transportation be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate and intrastate charges upon passengers traveling in sleeping cars and in parlor cars, and to establish, put in force, and maintain surcharges upon passengers traveling in sleeping cars and in parlor cars in intrastate commerce within the State of Wisconsin which shall correspond with the surcharges heretofore made by said carriers and now in effect under Ex Parte 74, upon passengers traveling in interstate commerce within the State of Wisconsin and between points in the State of Wisconsin and points in other states. (Record, p. 44.)

On December 3, 1920, the defendant, an interstate carrier operating in Wisconsin, applied to the United States District Court for the Eastern District of Wisconsin for an injunction restraining the plaintiffs from commencing any suit or doing any act to enforce the statutes of Wisconsin applicable to fares and charges, or to prevent the defendant from collecting intrastate fares and charges in accordance with the order of the commission. (Record, p. 1.) A temporary restraining order was issued on that date (Record, p. 11), and on December 11, 1920, an interlocutory injunction was granted (Record, p. 17). This appeal was taken December 18, 1920 (Record, p. 19), and allowed on the same date (Record, p. 21).

THE POWER OF A STATE TO REGULATE ITS INTERNAL COMMERCE.

The power of a state under our federal constitution to regulate its internal commerce may be succinctly stated in language from the opinions of this court:

> "When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance of their government. They retained for the purposes of government all the powers of the British Parliament and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective states, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, part of the powers of the states and of the people of the states was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the states, so that now the government of the states possesses all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people." *Munn v. Illinois*, 94 U. S. 113, 124.

> "The genius and character of the whole government, seems to be, that its action is to be applied to all the external concerns of the nation and to those internal concerns which affect the states generally; but not to those which are completely within the particular States, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of

the government. *The completely internal commerce of a State, then, may be considered as reserved for the State itself.*" *Gibbons v. Ogden*, 9 Wheat., 1, 195.

"*The states have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nation.*" *County of Mobile v. Kimball*, 102 U. S., 691, 699.

That the power of a state to regulate its internal commerceis a sovereign right, reserved and safeguarded by the federal constitution, and not subject to invasion by Congress, has been recognized in an unbroken line of decisions reaching down to the present time:

(1824) *Gibbons v. Ogden*, 9 Wheaton, 1.
(1876) *Munn v. Illinois*, 94 U. S., 113.
(1876) *Peik v. C. & N. W. R. Co.*, 94 U. S., 164.
(1885) *Stone v. Farmers' Loan & T. Co.*, 116 U. S., 307.
(1886) *Wabash, St. Louis & P. R. Co. v. Illinois*, 118 U. S., 557.
(1887) *Sands v. Manistee River I. Co.*, 123 U. S., 228.
(1887) *Dow v. Beidelman*, 125 U. S., 680.
(1889) *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S., 418.
(1891) *Chicago & Grand Trunk Co. v. Wellman*, 143 U. S., 339.
(1893) *Covington & Cincinnati R. Co. v. Kentucky*, 154 U. S., 204.
(1893) *Reagan v. Farmers' Loan & T. Co.*, 154 U. S., 362.
(1893) *Reagan v. Mercantile Trust Co.*, 154 U. S., 413.
(1894) *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S., 649.
(1895) *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S., 197.

(1897) *Smyth v. Ames,* 169 U. S., 466.
(1906) *Gulf, Colorado & Santa Fe Ry. Co. v. Texas,* 204 U. S., 403.
(1912) *Minnesota Rate Cases,* 230 U. S., 352.
(1913) *L. & N. R. Co. v. Garrett,* 231 U. S., 298.
(1914) *Chicago, Milwaukee and St. Paul Ry. Co. v. Iowa,* 233 U. S., 334.
(1915) *Pennsylvania Railroad Co. v. Mitchell Coal & Coke Co.,* 238 U. S., 251.
(1916) *American Express Co. v. South Dakota,* 244 U. S., 617.
(1917) *Ill. Central R. Co. v. Public Utilities Comm. of Ill.,* 245 U. S., 493.
(1919) *Arkadelphia Coal Co. v. St. L. S. N. Ry. Co.,* 249 U. S., 134.
(1919) *Southern Pacific Co. v. Arizona,* 249 U. S., 472.
(1920) *South Covington & Cincinnati St. Ry. Co. v. Kentucky,* 252 U. S., 399.
(1920) *Cincinnati, Covington & Erlanger Ry. Co. v. Kentucky,* 252 U. S., 408.

THE POWER OF A STATE TO REGULATE ITS INTERNAL COMMERCE IS SUBJECT TO CERTAIN NECESSARY LIMITATIONS.

The power of a state to control its internal commerce is, however, subject to certain necessary limitations:

> "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field." *Houston & Texas Railway v. United States,* 234 U. S. 342, 351.

It was accordingly held in the cited case that Congress has the power to forbid any discriminatory action by interstate carriers, which will obstruct the freedom of movement of interstate traffic over their lines at rates fixed by federal authority. It was also determined that the prohibition of section 3 of the Interstate Commerce Act, as it then stood, operated, in connection with other provisions of the Act, to empower the commission to require the removal of discriminations against interestate commerce of the character described in that section. In that case intrastate rates prescribed by state law were found discriminatory by the Commission and the discrimination was ordered removed. The proviso of section 1, hereinafter set out, was held not to apply to a case falling within the inhibition of section 3.

The language of the court touching this point was as follows:

> "Here the Commission expressly found that unjust discrimination exists under substantially similar conditions of transportation, and the inquiry is whether the Commission has power to correct it. We are of the opinion that the limitation of the proviso in section 1 does not apply to a case of this sort. The Commission was dealing with the the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate.
>
> The question was thus not simply one of discrimination wholly within one state. These words of the proviso have appropriate reference to exclusively intrastate traffic separately considered; to the regulation of domestic commerce as such. The powers conferred by the Act are not thereby limited when interstate commerce itself is involved. This is plainly the case wherein the Commission finds that unjust discrimination against interstate trade arises from the relation of intra-

> state to interstate rates as maintained by a carrier subject to the Act. Such a matter is one with which Congress alone is competent to deal and, in view of the aim of the Act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation. * * * We are not unmindful of the gravity of the question that is presented when state and federal views conflict. But it was recognized at the beginning that the nation could not prosper if interstate and foreign trade was governed by many masters, and when the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control."

THE EXTENT OF THE POWER OF THE COMMISSION OVER INTRASTATE RATES PRIOR TO THE PASSAGE OF THE TRANSPORTATION ACT.

The case which we have just cited was decided by this court in 1914. In the six years which intervened before the passage of the Transportation Act of 1920, the Commission in numerous cases was called upon to exercise its power to remove discriminations forbidden by section 3 of the Commerce Act, and the limits of that power were settled by a series of decisions, both of the commission and of this court. The following excerpts state such limits in the language of the Commission:

> "We have held that discriminations under the third section to be undue and unlawful must ordinarily be such that the prejudice arising out of it against one party is a source of advantage to the other alleged to be favored." *Board of Trade of Chicago v. A. T. & S. F. Ry.*, 29 I. C. C., 438, 443.

"Where the allowances prescribed by law for local shipments are paid, lower charges result on local than on export shipments, but *mere differences in charges do not establish unjust discrimination.*" *Shands v. S. A. L. Ry. Co.*, 34 I. C. C., 214, 215.

"Not all discriminations are unlawful, but only those that are unjust." *American Coal & Coke Co.*, 36 I. C. C., 195, 197.

"The testimony as to the alleged unjust discrimination in grain rates was exceedingly meager and unsatisfactory, *consisting chiefly in a showing of the present relation of the rates themselves. It affords no adequate basis for a finding that unjust discrimination exists.*" *Holmes & Hollowell Co. v. Great Northern Ry.*, 37 I. C. C. 627.

"The provisions of the act against unjust discrimination speak to the carriers of the country individually and with respect to those things for which they are individually responsible, and not to the carriers as parts of a single great system." *Galloway Coal Company et al.*, 40 I. C. C., 311, 315.

"Shippers at Nashville compete with shippers at Chattanooga, Tenn., and similar points. The switching charges maintained at these points are not based on cost, but there is no evidence that Nashville shippers would be handicapped by the charges proposed at Nashville in meeting such competition. Respondents challenged protestants to show in what way and to what extent shippers at Nashville would be injured but without eliciting any convincing replies. Not every difference in rates to competing points from common points of origin constitutes unjust discrimination, *City of Astoria v. S. P. & Ry. Co.*, 38 I. C. C., 16, and different switching charges at competing points may also be entirely equitable." *I. & S. Docket No. 758. Nashville Switching Case*, 40 I. C. C. 483, 496.

"The mere maintenance of a rate for movement of traffic wholly within a state lower than a rate

found reasonable by this Commission for the local state portion of a through interstate movement does not of itself constitute undue discrimination within the meaning of the Act. The State Public Utilities Commission of Illinois, acting within the scope of its authority, has the undoubted right to prescribe rates of freight applicable to movements of traffic by railroad wholly within the State of Illinois. In a case which merely calls to our attention the fact that a state rate is lower than an interstate rate on the same traffic from and to the same points, we have no authority or power to condemn the state rate and take action which would be warrant to carriers to increase it to the level of the applicable interstate rate. It is only in cases where the rates prescribed by the state authorities necessarily operate to unduly prefer a state over an interstate shipper, or to otherwise interfere with the proper application of rates prescribed by this Commission, that the authority of the federal law is properly to be exercised." *Memphis Merchants Exchange et al. v. Illinois Central Railroad Company et al.*, 43 I. C. C. 378.

"We must, to make a finding of discrimination, be shown the fact of discrimination, not merely the difference in ratings without the cause and reason for the difference. Uniformity is desirable and in some instances it is necessarily required; but its absence does not *prima facie* connote illegality, as differences in transportation conditions may, and frequently do, require a deviation from uniformity in particular instances to accomplish the legality and reasonableness of rates which the law exacts." *National Confectioners' Association et al. v. Aberdeen & Rockfish Railroad Company et al.*, 49 I. C. C., 566, 576.

"It is well settled that discriminations under the third section to be undue and unlawful must ordinarily be such that the prejudice arising out of it against one party is a source of advantage to the other alleged to be favored, and that gener-

ally a competitive relation between the commodities must appear. *Board of Trade of Chicago v. A. T. & S. F. Ry Co.*, 29 I. C. C., 438, 443." *California Walnut Growers' Association et al. v. Aberdeen & Rockfish Railroad Company et al.*, 50 I. C. C., 558, 568.

Prior to the decision in *Houston & Texas Railway v. United States*, 234 U. S. 342, cited *supra*, hereinafter referred to as the Shreveport case, the question of the effect of the Interstate Commerce Act upon state power of regulation was discussed by this court in its opinion in *The Minnesota Rate Cases*, 230, U. S., 352, 412. The court there said:

"State regulation of railroad rates began with railroad transportation. The railroads were chartered by the states and from the outset, in many charters, maximum rates for freight or passengers, or both were prescribed. * * * (413) The authority of the state to limit by legislation the charges of common carriers within its borders was not confined to the power to impose limitations in connection with grants of corporate privileges. In view of the nature of their business, they were held subject to legislative control as to the amount of their charges unless they were protected by their contract with the state. * * * The court, however, went further than to sustain the state law with respect to rates for purely intrastate carriage. Thus, the act of Wisconsin covered traffic which started within the state and was destined to points outside, and this was treated as being within the state power (*Peik v. Chicago & Northwestern Railway Co.*, 94 U. S. 164, 177, 178.) * * *

(414) It became a frequent practice for the states to create commissions, as agencies of state supervision and regulation, and in many instances the rate-making power was conferred upon these bodies. * * *

(415) In *Wabash, St. L. & P. Railway Co. v.*

Illinois, supra, it was finally determined that the authority of the state did not extend to the regulation of charges for interstate transportation. * * *

But no doubt was entertained of the state's authority to regulate rates for transportation that was wholly intrastate. And, in illustrating the extent of state power (*id.*, p. 564), the court selected transportation across the state from Cairo to Chicago and from Chicago to Alton, all boundary points constituting important centers of commerce—the one on Lake Michigan, and the other at the confluence of the Mississippi and the Ohio rivers, and of the Mississippi and Missouri rivers, respectively. After reviewing decisions holding state laws to be ineffective which imposed a direct burden upon interstate commerce, * * * the court emphasized the distinction with respect to the operation of the statute upon domestic transactions, saying: 'Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the state it may be very just and equitable, and it certainly is the province of the state legislature to determine that question.' (*Id.*, p. 577.)

The doctrine was thus fully established that the state could not prescribe interstate rates but could fix reasonable intrastate rates throughout its territory. The extension of railroad facilities has been accompanied at every step by the assertion of this authority on the part of the states and its invariable recognition by this court. * * *

(417) When Congress, in the year 1887, enacted the Act to Regulate Commerce (24 Stat. 379, c. 104), it was acquainted with the course of the development of railroad transportation and with the exercise by the states of the rate-making power. An elaborate report had been made to the Senate by a committee authorized to investigate the sub-

ject of railroad regulation in which the nature and extent of state legislation, including the commission plan, were fully reviewed (Senate Report 46, submitted January 6, 1886, 49th Congress, 1st session). And it was the fact that beyond the bounds of state control there lay a vast field of unregulated activity in the conduct of interstate transportation which was found to be the chief cause of the demand for Federal action.

Congress carefully defined the scope of its regulation and expressly provided that it was not to extend to purely intrastate traffic. In the first section of the Act to Regulate Commerce there was inserted the following proviso:

'*Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property or to the receiving, delivering, storage, or handling of property, wholly within one state, and not shipped to or from a foreign country from or to any state or territory as aforesaid.'

When in the year 1906 (act of June 29, 1906, c. 3591, 34 Stat. 584), Congress amended the act so as to confer upon the Federal commission power to prescribe maximum interstate rates, the proviso in section one was re-enacted. Again, in 1910, when the act was extended to embrace telegraph, telephone and cable companies engaged in interstate business, the proviso was once more re-enacted, with an additional clause so as to exclude intrastate messages from the operation of the statute. Act of June 18, 1910, c. 309, 36 Stat. 539, 545. The proviso in its present form reads:

'*Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly

within one state and not transmitted to or from a foreign country from or to any state or territory as aforesaid.'

There was thus excluded from the provisions of the Act that transportation which was 'wholly within one state,' with the specified qualification where its subject was going to or coming from a foreign country. * * *

(420) The question we have now before us, essentially, is whether after the passage of the Interstate Commerce Act, and its amendment, the state continued to possess the state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic. * * * Having regard to the terms of the Federal statute, the familiar range of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court recognizing and upholding this authority, we find no foundation for the proposition that the Act to Regulate Commerce contemplated interference therewith."

In the Shreveport case the court further discussed the question. Referring to the proviso in section 1 of the Act, it said:

"Congress thus defined the scope of its regulation and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrastate rates and thus to establish a unified control by the exercise of rate-making power over both descriptions of traffic. Undoubtedly, in the absence of a finding by the Commission of *unjust discrimination*, intrastate rates were left to be fixed by the carrier and subject to the authority of the states or of the agencies created by the states." *Houston & Texas Ry. v. United States*, 234 U. S. 342, 357.

Thus it was established by clear declaration of this court, made in construing the Act as it then stood, that Congress had not intended to interfere with state authority to prescribe reasonable intrastate rates, nor to grant to the Commission a unified authority over state and intrastate rates, which might be exercised to bring the same to a standard adjudged reasonable by the Federal Commission.

What section 3 aimed to require was not the allowance of rates reasonable in amount, but rates nondiscriminatory in their relation to other rates. As to intrastate rates the Commission was given no jurisdiction except upon a showing that, by reason of the difference in scale between intrastate and interstate rates, persons or localities enjoyed or were subject to undue or unreasonable preference or advantage, or unreasonable prejudice or disadvantage. Without exception, we think, save in the case immediately to be noted, the Commission, prior to the passage of the Transportation Act, never ordered the removal of discrimination except upon proof of a discrimination of that character affecting persons or localities.

In a single case the Commission did apparently endeavor to stretch its authority. Upon evidence tending to show discrimination against two points outside the state, the Commission entered an order which seemed to be designed to require an adjustment of all intrastate passenger fares in Illinois upon the same basis as was then in effect for interstate fares between Illinois points and St. Louis and Keokuk, the two points outside the state found to be discriminated against. The interstate rate was 2½ cents and the state rate 2 cents. In its report of facts found, upon which the order was based, the Commission reported that the preference or advantage to intrastate passen-

ger traffic imposed "an unreasonable and unlawful burden on interstate passenger traffic." The Commission would appear to have had in mind increasing the revenue derived by carriers from intrastate passenger traffic through the instrumentality of an order ostensibly aimed to remove the discrimination which had been found against St. Louis and Keokuk, the two points in question.

This court, however (*Illinois Central Railroad Co. v. Public Utilities Commission*, 245 U. S. 493, 507), refused to interpret the Commission's order as requiring a state-wide readjustment of rates, but attributed to it an intent only to remove the discrimination found, saying:

> "The parties differ widely about the scope of the order. The carriers assert that it covers every intrastate passenger rate in Illinois, is addressed to the removal of discrimination found to be state-wide, and gives ample authority for increasing all rates between points in Illinois from 2 cents to 2.4 cents per mile. On the other hand, the state authorities assert that it is not state-wide and that the extent to which it is intended to affect the state-made rates is so indefinitely and vaguely stated as to make it inoperative and of no effect as to them. Of course, the Commission could adjust the remedy to the evil and make the order as broad as the wrongful discrimination; and not improbably it would intend to go that far and no farther.(But the extent of the discrimination found and of the remedy applied must be gathered from the reports and order of the Commission, for they constitute the only authoritative evidence of its action. The reports show that the only discrimination found relates to the passenger traffic between Illinois and the two cities outside that state—St. Louis and Keokuk. There is no finding that this traffic extends in appreciable

volume to all sections of Illinois. As to some sections its volume may be very large and as to others almost or quite negligible. At best the reports leave the matter uncertain. Obviously this traffic is only a small part of the interstate passenger traffic moving over the railroads in Illinois, and yet the finding is merely that there was discrimination against this part. Had the Commission regarded the discrimination as state-wide it is but reasonable to believe that it would have said so in its findings. And had it intended to require or authorize a state-wide readjustment of the intrastate rates it doubtless would have given direct expression to that purpose, which easily could have been done in a few lines. But neither in any part nor as a whole does the order plainly manifest such a purpose. * * *

(509) The uncertainty arises out of a failure to designate with appropriate precision the territory or points to and from which the intrastate rates must or may be readjusted, and this omission accords with the absence from the reports of any finding showing definitely the territory or points where those rates operate prejudicially against the interstate traffic which the order is intended to protect.

To be effective in respect of intrastate rates *established and maintained under state authority* an order of the Commission of the kind now under consideration must have a *definite field of operation* and not leave *the territory or points to which it applies uncertain.*"

The language quoted seems to make it clear that the power of the Commission to require an adjustment of state rates, under the law as it then stood, reached no farther than the wrongful discrimination between traffic found to be preferred and that found to be prejudiced. The implication also is clear that such discrimination can be found only as to points

between which there is competitive traffic "in appreciable volume." The court simply *ignored the finding that the intrastate scale imposed "an unreasonable and unlawful burden on interstate commerce."*

This opinion was in harmony with the earlier opinion of this court in *American Express Co. v. Caldwell*, 244 U. S., 617, 624. In that case the Commission had made an order which the express company had interpreted as giving it authority to make a state-wide readjustment of rates previously prescribed by authority of the State of South Dakota, but the court held that the order was intended to cover merely points on certain lines in the southeastern part of the state, which points were tributary to five cities on said lines, as between which and Sioux City discrimination was found. Mr. Justice Brandeis, giving the opinion of the court, emphasized the fact that the question of reasonableness of rates was not involved in a proceeding to remove discrimination. Upon this point he said:

> "But the fact that discrimination exists and that the interstate rates are reasonable does not necessarily imply a finding that the intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve unjust discrimination. *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S., 263, 277. *Proceedings to remove unjust discriminations are aimed directly only at the relation of rates.* If in such a proceeding an unreasonable rate is uncovered and that rate made reasonable, it is done as a means to the end of *removing discrimination.* The correction is an incident merely."

THE COMMISSION'S ORDER.

The order of the Commission, set out at page 15 of this brief, requires the carriers in Wisconsin to

make increases in their intrastate fares and charges for the transportation of passengers and baggage in Wisconsin "corresponding with the increases heretofore made by said carriers and now in effect under *Ex Parte* 74 for the transportation of passengers and their baggage in interstate commerce."

The facts found by the Commission in its report set out at page 7 of this brief, upon which the Commission rested this order, so far as there seems to be occasion to state them here, may be summarized as follows:

It found that by a statute in effect in Wisconsin prior to Federal control, set out in the report of the Railroad Commission of Wisconsin, hereinafter referred to as the Wisconsin Commission, applicable to all the principal lines in Wisconsin, passenger fares were limited to 2 cents per mile; that during Federal control all fares in that state, both interstate and intrastate, were fixed upon a basis of 3 cents per mile, and so remained until the termination of Federal control; that a temporary injunction had been granted by the Federal court restraining the enforcement of the Wisconsin statute; that passenger fares, under the authority of the Commission's order in *Ex Parte* 74, were on August 26, 1920, ordered to the basis of 3.6 cents per mile.

It is found that upon an application to the Wisconsin Commission for permission to advance intrastate fares that Commission declined to pass upon the merits of the application, on the sole ground that it was without jurisdiction; that accordingly intrastate fares continued upon the basis of 3 cents per mile.

It is found that certain border points within and without Wisconsin are in close proximity to each other and compete for locations of industries, and for retail and, to some extent, for wholesale trade.

It is found that the increases of interstate fares made under *Ex Parte* 74 resulted in reasonable fares for interstate transportation within the group including Wisconsin, and that the failure of said carriers to increase intrastate fares and charges correspondingly within the State of Wisconsin will result in intrastate fares lower than the corresponding interstate fares, in undue prejudice to persons traveling in intrastate commerce, in undue preference of and advantage to persons traveling intrastate, and in unjust discrimination against interstate commerce.

It is found "that said undue prejudice and preference and unjust discrimination can and should be removed by making increases in said intrastate * * * fares * * * which shall correspond with the increases heretofore made in interstate fares."

It is found, further, that the transportation services to which the rates both interstate and intrastate pertain "in each instance are performed by the carriers under substantially similar circumstances and conditions."

Upon this finding of facts the order could not stand under the rule clearly laid down in the case of *Illinois Central Railroad v. Public Utilities Commission*, 245 U. S., 493, cited *supra*. In that case, as before stated, the court held an order of the Commission void for uncertainty, saying:

> "The uncertainty arises out of a failure to designate with appropriate precision the territory or points to and from which the intrastate rates must or may be readjusted, and this omission accords with the absence from the reports of any finding showing definitely the territory or points where those rates operate prejudicially against the interstate traffic which the order is intended to protect.

> To be effective in respect of intrastate rates established and maintained under state authority an order of the Commission of the kind now under consideration must have a definite field of operation and not leave the territory or points to which it applies uncertain."

This opinion in the case just cited, repeats also what was said in *American Express Co. v. Caldwell*, 244 U. S., 617, 625, in part as follows:

> "Where a proceeding to remove unjust discrimination presents solely the question whether the carrier has improperly exercised its authority to initiate rates, the Commission may legally order, in general terms, the removal of the discrimination shown, leaving upon the carrier the burden of determining also the points to and from which rates must be changed, in order to effect a removal of the discrimination. *But when, as here, there is a conflict between the Federal and the state authorities*, the Commission's order cannot serve as a justification for *disregarding a regulation or order issued under state authority*, unless and except so far as, it is *definite as to the territory or points to which it applies.*"

In this case, while the Commission finds that certain border points within and without Wisconsin are in competition, it is not found that even those points are discriminated against.

It is also found that the maintenance of the lower intrastate scale results in undue prejudice "to *persons* traveling in interstate commerce within * * * Wisconsin and between *points* in the State of Wisconsin and *points* in other states."

But *what persons* and *what points* suffer from such undue prejudice, and *what persons* and *what points* enjoy the preference and advantage found, are not made definite, nor even sought to be indicated.

In this respect the findings of the Commission are much more vague and uncertain than in the Illinois case, just cited. The reason for the failure of the Commission to make clear the extent of the existing discrimination against interstate traffic which by the order it attempts to remove, however, clearly appears upon an examination of the Commission's report. The Commission conceives its power to have been sufficiently increased by certain amendments to the Interstate Commerce Act, so that it is no longer required to find discrimination in the sense in which that term was formerly used, before it may set aside intrastate rates, and prescribe rates of its own making. The statements in the report of facts might make part of proof of actual discrimination were put in as mere make-weights. This we think fairly appears from an examination of the argument whereby the Commission seeks to justify its order.

The reasoning on which the order is based is not all contained in its report in this case. Reference is made therein to the New York and Illinois cases, where, it is said, contentions the same in the main as those made by the state in this case were considered. The reports in those cases, which are in the record, must be read as parts of the Wisconsin report. When this is done, the Commission's erroneous conception of the law, which led it to make the order complained of clearly appears.

In the New York case the claim of an enlarged power was first put forward and acted upon. In the Illinois case it was renewed and more fully and clearly stated.

In the New York case the Commission, referring to the principle laid down by it in the Shreveport case, said:

"The position we took was sustained by the United States Supreme Court, and the principle on which we acted then continues to be our guide. But since then the general obligation resting upon us to exercise control over intrastate commerce so far as it affects interstate commerce has been put in the form of a mandate by Section 13 of the Interstate Commerce Act, as amended by the Transportation Act, 1920.

"It has been urged in opposition to the application of this principle to the pending case that such incidental jurisdiction as we may possess over intrastate rates *is contingent upon* proof that discrimination exists affecting particular persons or localities. But inasmuch as the basis of our jurisdiction is our power to regulate interstate commerce, it follows that the decisive factor is whether the rates under consideration injuriously affect interstate commerce. * * * (Record, p. 96.)

"It has not happened heretofore that we have had occasion to make such an extensive exercise of our authority as is now contemplated, and we could not be moved to do so save by the most cogent reasons. Such reasons have been supplied by the situation in which transportation interests of the country were placed and the action taken by Congress to relieve that situation.

"Our findings in Increased Rates, 1920, *supra*, were responsive, as the report shows, to legislation enacted by the Congress as part of the Transportation Act, 1920, approved February 29, 1920, now incorporated in the Interstate Commerce Act as part of Section 15a thereof, paragraphs 2 and 3. (Record, p. 97.) * * *

"Congress has taken, as the basis for determining a fair return for the railroads, the aggregate value of the railway properties in each group held for and used in the service of transportation. In making a tentative finding of the value of the railway properties in each group, for the purposes

of our report, we included all the railway property of each carrier held for and used in the service of transportation. * * * Congress has directed that we allow rates that will yield in the aggregate a return of 5½ or 6 per cent upon the value of the railway property in each of the groups. There can be no doubt of the power of Congress to devise and provide for the carrying into effect a plan for assuring to the nation's interstate railroads a fair return upon the value of their property; and the full control by Congress of this matter is not to be denied on the ground that the carriers' aggregate earnings are a commingling of intrastate revenue and interstate revenue. * * * (Record, p. 98.)

"The record shows that the refusal of the State of New York to permit the carriers to increase the rates and fares here in controversy to the extent approved by us is costing the railroads between $11,000,000 and $12,000,000 annually. In other words, the annual earnings of the interstate carriers operating in New York are now between $11,000,000 and $12,000,000 less than they would be if the general level of rates and fares approved by us had become effective on intrastate traffic, and to that extent the declared purpose of Congress is defeated by a preferential basis of rates and fares maintained by authority of the State of New York." (Record, p. 99.)

In spite of a disposition shown by the Commission in other portions of the opinion to run back to old terms, it is clear that it felt that it had entered a new field, and was exercising a new power. Its conception is that Congress in Section 15a of the Interstate Commerce Act, as it now stands, ordered it to procure for the carriers upon the value of all their property, employed both in interstate and intrastate operations, a stated return. The refusal of the state authorities to permit advances of intrastate rates corresponding to those al-

lowed by it operates to defeat the declared purpose of Congress, by a preferential basis of rates, and results in an unlawful preference against interstate shippers and in *discrimination of a new kind* against interstate commerce.

In the Illinois case this theory was elaborated as follows:

> "The state authorities contend that paragraph 4, section 13, of the act is merely a restatement of the effect of section 3 of the act as interpreted by the Supreme Court in the Shreveport case, *supra*. The provision in question reiterates in effect what is stated in section 3, but in it Congress has gone further than declaring that there shall be no undue or unreasonable advantage, preference, or prejudice as between persons and localities, as in section 3, and has forbidden and declared unlawful 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.' The term 'commerce' covers the entire field of transportation—the traffic itself and all the instrumentalities and means of carrying it on. The language used is certainly broad enough to cover every discrimination growing out of the relation between intrastate and interstate commerce which injuriously affects the latter. * * * (Record, p. 37.)
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> "The Supreme Court, in the Minnesota Rate Cases, 230 U. S., 352, recognized the power of the Federal Government to supervise the rates of intrastate commerce when they are so intermingled with interstate commerce on roads engaged in both that in the interest of interstate commerce such regulation becomes necessary. * * * (Record, p. 38.)
>
> "The primary purpose of Congress was to return the roads to private ownership surrounded by such safeguards as would assure the people of the whole country adequate service. To rehabili-

tate the railroads so that they might perform the duties necessary to the very life of the nation Congress determined upon a definite plan. It extended the guaranty period for six months beyond the termination of Federal control. It directed us to initiate, modify, establish, or adjust rates so that carriers as a whole * * * will * * * earn an aggregate annual net railway operating income equal as nearly as may be to a fair return upon the aggregate value of the railway property of such carriers. * * * It provided that in determining the fair return to the carriers we 'shall give due consideration, among other things, to the transportation needs of the country, and the necessity * * * of enlarging such facilities in order to provide the people of the United States with adequate transportation.' It directed us to take as such fair return for two years beginning March 1, 1920, a sum equal to 5½ per cent of the aggregate value of the carriers' property, and authorized us, in our discretion, to add thereto a sum equal to ½ of 1 per cent of such value to make provision for improvements, betterments or equipment.

"The terms of the act are sufficiently broad to forbid unjust discrimination against interstate commerce without reference to particular persons or localities. Considering the conditions existing at the time of the passage of the act, the purpose of the act to correct those conditions, and the legislative scheme adopted by Congress to carry out that purpose, we have no doubt that Congress meant to give full import to the language used, and that the prohibition against 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce' is not limited to particular persons or localities, but is applicable to such discrimination against interstate or foreign commerce in their broad definitions. * * * (Record, p. 30.)

"In our decision in Increased Rates, 1920, we

fixed the increases in rates, fares and charges necessary to comply with the act. It must be remembered that in fixing those increases we were acting within our power 'to prescribe just and reasonable rates.' The resulting rates therefore become, in effect, what Congress has deemed on the whole necessary to yield the carriers the prescribed return on the value of their property. * * * (Record, p. 40.)

"In that case, comformably to the act, in the exercise of our power to prescribe just and reasonable rates, we determined the increased fares that were necessary in order that the passenger traffic should contribute its proper proportion to a fair return on the aggregate property value. If, without good reason, the fares within a state are lower than those authorized and established for interstate application, intrastate passenger traffic will not contribute its just share to the passenger revenues of the carriers, and the carriers may not earn the statutory return without further increases in the transportation charges on other traffic, including interstate commerce, thus unjustly discriminating against such commerce. Such a situation will also result, as the record discloses, in depleting the revenues from interstate commerce by diverting to intrastate channels what otherwise would form part of interstate passenger traffic. Thus, the existence, side by side with interstate fares, of intrastate fares fixed at a lower level constitutes an obstruction to interstate commerce, thereby unduly, unreasonably and unjustly discriminating against such commerce, in contravention of the act." (Record, p. 40.)

This is the reasoning upon which the order rests, and the discrimination found is of the character described by the Commission in the language here quoted.

What the Commission has done in this case is to renew the attempt which it made in the Illinois passenger rate case (*Illinois Central Railroad Co. v. Pub-*

lic Utilities Commission, 245 U. S. 493) to raise intrastate rates, deemed by it burdensome to interstate commerce, because lower than interstate rates which it had approved. The attempt made in that case was halted by the decision of this court. The provisions added to the Interstate Commerce Act, by the Transportation Act, upon which the Commission relies as extending its authority, will be later examined herein.

THE OPINION OF THE LOWER COURT.

The injunction granted below in support of the Commission's order rests upon the same conception of the law as produced the order. The opinion of the court, under which the injunction was granted, is in part as follows:

> "Having in mind all of the legislation, we find that Congress has now arrived at a point where it has authorized the Interstate Commerce Commission not to deal with intrastate traffic as such, but to deal with it only as a matter with which the Federal Government has control. In such cases Congress has authorized the Interstate Commerce Commission to touch upon and regulate these intrastate rates which apply to persons who availed themselves of these instrumentalities of interstate commerce and ride upon these interstate trains. In other words, the purpose of Congress is clearly apparent to us to protect interstate commerce as such *from any burden that might be put upon it by the state*, that is, directly through the legislature of the state or through the orders of a state Railroad Commission, *which would cause a burden upon the interstate commerce and impair the revenues* which the Interstate Commerce Commission are authorized to investigate and find are necessary to induce the American people to furnish and maintain these national carriers and in-

terstate highways. In addition to the sections which bear directly upon this subject of discrimination against interstate commerce, there are the financial provisions, and there is also the power given to the Commission to prescribe the rate which it finds necessary in order to maintain the revenues that are necessary for the lives of these national carriers. When you look to the financial consideration of the act *it is self-evident that the purpose of Congress* in authorizing the Interstate Commerce Commission to act, *and the purpose of the Commission*, to find what is necessary to produce the indispensable revenue *would be destroyed*, if the state were permitted to allow *intrastate passengers to ride upon interstate trains at a lesser compensation.* * * *" (Record, p. 13).

THE AMENDMENTS RELIED ON.

For the convenience of the Court we set out herein amendments to the Commerce Act contained in the Transportation Act of 1920, which are relied on to support the Commission's order:

> Sec. 13 (3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the

Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the co-operation, services, records and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Sec. 15a. (2). "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical man-

agement and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due con-

sideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission, for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described." * * *

THE AMENDMENTS CONTAINED IN THE TRANSPORTATION ACT ARE TO BE CONSTRUED IN THE LIGHT OF THE SITUATION EXISTING WHEN THAT ACT WAS PASSED.

In order that the amendments to the Interstate Commerce Commission Act, contained in the Transportation Act, may be most easily construed, it is necessary to keep in mind the situation which confronted Congress when the Act took form and was passed. This situation is common knowledge and the time is so recent that the main facts are in the minds of all. They are evidenced also by representations made to committees having the bill in charge during its passage through Congress.

AUTHORITIES SUPPORTING THE PROPRIETY OF REFERENCE TO LEGISLATIVE PROCEEDINGS.

It appears to be well settled that when an act to be construed is capable of various interpretations, reference may be had to representations made to Congress, and to testimony before committees, to committee reports, and to statements made concerning the purpose and meaning of the bill while under consideration in either house by the committee member having the bill in charge.

Holy Trinity Church v. United States, 143 U. S., 457, 464; *Johnson v. Southern Pacific*, 196 U. S. 1, 19; *Houston & Texas Railway v. United States*, 234 U. S. 342; *Caminetti v. United States*, 242 U. S. 470, 490; *Corona Coal Company v. Southern Railway*, 266 Fed. 726, 732; *Duplex Printing Company v. Deering*, U. S. Supreme Court, unreported.

In the case last cited, this court laid down the rule concerning statements in debate and cited authorities as follows:

> "By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. *Aldridge v. Williams,* 3 How. 9, 24; *United States v. Union Pacific R. R. Co.,* 91 U. S. 72, 79; *United States v. Freight Association,* 166 U. S. 290, 318. But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. *Binns v. United States,* 194 U. S. 486, 495. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. *Binns v. United States, supra; Penna. R. R. Co. v. International Coal Co.,* 230 U. S., 184, 198-199; *United States v. Coca Cola Co.,* 241 U. S. 265, 281; *United States v. St. Paul, M. & M. Ry. Co.,* 247 U. S. 310, 318."

In discussing the amendments here in question, reference will accordingly be freely made to these sources of information, so far as it appears that they may be helpful to the Court in ascertaining the purpose of the amendments and their true meaning.

THE SITUATION EXISTING WHEN THE TRANSPORTATION ACT WAS PASSED.

The Transportation Act was framed and enacted in the months immediately following the war. The railroads, with minor exceptions unnecessary to mention,

were in the possession of the Government and operated by the President through the Director General. In consequence of the war, and the great economic changes which resulted from it, operating costs had increased greatly, and net railway operating income had correspondingly decreased. The Director General, exercising the unlimited power over rates and charges vested in the President by the Federal Control Act (*Northern Pacific Railway Co. v. North Dakota*, 250 U. S. 135), had made marked advances in freight rates, both interstate and intrastate, and had fixed passenger rates, both interstate and intrastate, upon a minimum basis of 3 cents per mile. In some sections of the country he had fixed such rates upon a substantially higher basis.

In spite of these efforts on the Director General's part to increase net railway operating income, the railroads were failing to earn the standard return, which the Government had obligated itself to pay, at the rate of from $500,000,000 to $800,000,000 per year. (Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on H. R. 4378, statement of Honorable C. A. Prouty, page 3158.)

The country was discontented with Federal operation, and desired the roads returned to private control. The owners were desirous of receiving them back, but wished to be relieved from the loss of the amount below the standard return then being paid by the Government, which it was seen must be suffered during the return to normal conditions. The situation was complicated by the fact that in a considerable number of states statutes made in peace times prescribed intrastate fares, and in some states freight rates as well.

If the roads were returned to their owners without the Federal power being exercised in some way for the fixation of the rates and fares which had been established by the Director General, these state statutes would take effect automatically, and operate to reduce all rates covered thereby to the pre-war limits, thus still further reducing the revenues of carriers. The same was true as to all intrastate rates and fares fixed by Commission orders, although as to those a more prompt readjustment might be expected.

This was the situation which had been produced by the war, and by Federal control. Other matters were, however, pressed upon the attention of Congress, which it was desired to cover by such legislation as might be enacted. These may be briefly referred to.

In the regulation of rates of carriers for interstate and intrastate transportation by the Federal and State governments, respectively, conflicting schedules of rates were sometimes prescribed, resulting in actual or claimed discrimination against interstate commerce. Under the law as it then stood, as has been shown in cases before cited, the Federal commission had power to require such discriminations to be removed. The Commerce Act, however, contained no provision safeguarding such power of regulation by granting to State authorities the right to notice of proceedings aimed to remove alleged discrimination, and giving to them the right to take part in such proceedings.

There was no provision in the Act authorizing the Commission to enter upon joint conferences and joint hearings with state regulatory authorities concerning rates claimed to be discriminatory, with a view to the removal of any discriminations that might be found

through the reaching of common understandings as to what rates, interstate and intrastate respectively, ought to be prescribed.

Furthermore, while the Commission had authority under the Commerce Act to order the removal of discriminatory intrastate rates, it had no power to prescribe the rates to be substituted for the rates so found discriminatory. An order of the Commission requiring the removal of a discrimination found, operated, accordingly, to release the carriers affected from State authority as to the rates found discriminatory, and left them free to impose rates of their own making.

Legislation touching both these matters was desirable.

In addition, under the law as it stood, carriers had no means whereby they could procure an adjudication as to the propriety of rates prescribed by State authority, but believed by carriers to be discriminatory. They were obliged to put and keep the same in force, regardless of their own belief that they were in violation of the Federal law, and regardless of their wish to conform their rates to that law. Not until proceedings had been filed against a carrier so situated by injured shippers or localities, and until after hearing, the Commission had found that the carrier was violating the law, and had ordered it to desist, could such carrier conform its rate structure to the equirements of the Commerce Act. *The Minnesota Rate Cases*, 230 U. S.

This inability on the part of carriers to secure an adjudication from the Commission as to the lawfulness of intrastate rates prescribed by State author-

ities, but alleged to be discriminatory, whether actually or not a hardship, was urged as such.

Finally it was represented to the Congress that the law prescribing the powers and duties of the Commission should give to it the power to initiate rates, and charge it with the duty to fix them upon a basis which should produce an indicated return to the carriers. It was likewise urged that the Congress should by law attempt to vest in the Commission full power, either directly or through proceedings of a supervisory character, to regulate all rates, intrastate as well as interstate. Upon this last point, diametrically opposing views were urged with much insistence.

This summary statement is supported by the evidence presented to the House Committee on Interstate and Foreign Commerce at the hearings held on H. R. 4378. No attempt will be made to reproduce that evidence in any considerable part, but hereinafter, in the chapter devoted to the legislative history of the amendments in question, such part of the same will be reproduced as it is thought may throw light upon the amendments finally adopted, and now before the Court for construction in this case.

LEGISLATIVE HISTORY OF AMENDMENTS. SUBJECTS OF LEGISLATION CONSIDERED.

There were, then, to recapitulate, the following subject matters for possible legislation: (1) Provision of adequate return for carriers during period of readjustment; (2) fixation of intrastate rates during period of readjustment; (3) provision for notice to State authorities, and giving them right to participation in such proceedings; (4) express provision for joint con-

ferences and joint hearings with state commissions; (5) authorization to the Commission to fix rates to take the place of rates found discriminatory; (6) authorization of carriers to complain of discriminations; and (7) possible extension of power of the Commission to control all intrastate rates.

The First Esch Bill, H. R. 4378.

The legislative history of the amendments, so far as it is possible to show the same from the record of proceedings in Congress, begins with the introduction of H. R. 4378, "A Bill to further amend an act entitled 'An Act to regulate commerce,' approved February 4, 1887, as amended, and for other purposes." This bill was introduced on January 2, 1919, and referred to the Committee on Interstate and Foreign Commerce. It proposed to amend the Interstate Commerce Act in various respects. The Commission was to be granted authority over extensions and abandonments of lines by interstate carriers, and control over their securities, and to be granted also extensive powers over car service, and consolidations of carriers.

Paragraphs (3) and (4) of Section 13 as in H. R. 4378.

Section 13 contained amendments to Section 13 of Act to Regulate Commerce. It was proposed to add two paragraphs to the section, as follows:

> "Whenever in any investigation under the provisions of this act there shall be brought in issue the lawfulness of any rate, fare, charge, classification, regulation, or practice made or imposed by authority of any state, the Commission, before

proceeding to hear and dispose of such issue, shall cause such state or states to be notified of the proceeding. The Commission may confer with the authorities of any state having regulatory jurisdiction over the class of persons and corporations subject to this act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such state bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such state regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a state is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such state authorities in the enforcement of any provision of this act.

"The Commission shall have authority, after full hearing, to make such findings and orders as may in its judgment tend to remove any undue preference or prejudice as between persons or localities in state and interstate or foreign commerce, or any undue burden upon interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, and such findings or orders shall be observed while in effect by the carriers parties to such proceeding affected thereby, any act, decision or order of any state or state authority to the contrary notwithstanding."

The bill did not provide for the termination of Federal control. Hence it did not cover (1) and (2) of the enumerated subjects of legislation. It will be noted, however, that the following purposes were cov-

ered: (3) Notice was provided to states in proceedings concerning alleged discriminatory rates; (4) provision was made for the holding of joint conferences and joint hearings between the Federal and state commissions; (5) authority was granted the Federal commission to fix rates; and, covering the subject heretofore enumerated under (7), the Commission was given express power to remove undue burden.

This provision as to "undue burden," from the manner in which the bill was drawn, would appear to have been designed for the purpose of giving to the Commission complete control over all rates, intrastate as well as interstate.

It was upon this bill that the hearings were conducted to which references will be hereinafter made. (Report of Committee on Interstate and Foreign Commerce, Report No. 456, "Return of railroads to private ownership," page 1. This report was made November 10, 1919, to accompany H. R. 10453, hereafter referred to.)

PROPOSED RE-ENACTMENT OF PROVISO OF SECTION 1, H. R. 4378.

If the "undue burden" provision in the proposed amendment to Section 13 was to be construed as giving to the Commission power to raise rates for purposes of increasing revenue, it was a direct encroachment upon the regulation of intrastate commerce, never before attempted by Federal law. It was, of course, wholly inconsistent with the proviso theretofore carried in the first section of the Interstate Commerce Act, heretofore set out in the Minnesota Rate Cases opinion on page 25 of this brief. This incon-

sistency was recognized in the bill, and the intent to deprive the States of power over intrastate rates was indicated by a proposed re-enactment of the proviso as follows:

> "Provided, however, That the provisions of this act, *except as expressly provided in section 13 thereof*, shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid."

H. R. 4378 COMMISSION'S BILL.

This bill was commonly called the "Commerce Commission" bill, and the plan of the bill is designated as the "Commerce Commission" plan in the synopsis of various plans in the Committee report before referred to. (Report No. 456, at page 46.) Commissioner Clark was the first witness before the Committee, and explained the bill paragraph by paragraph, with particular reference to recommendations made by the Commission to the Congress in its annual reports (House Hearings, page 8).

An examination of his testimony will indicate, it is believed, that the bill was in fact the Commission's bill. The amendments to Section 13, containing the "undue burden" clause, was referred to as follows by him, in reply to a question from the Committee concerning state rates (House Hearings, page 96):

> "*Our position* with regard to that, I think, *is very definitely shown in the terms of this bill*, which we approve."

A reply, general in form, also made by him to an inquiry concerning a particular matter, may, we think, be taken as true of the bill generally. He said (House Hearings, page 2944):

> "*The judgment of the Commission*, Mr. Chairman, *is reflected in the present terms of this bill.*"

It was for this reason, no doubt, that, as he testified, he was "asked to try to keep in touch with the hearings as they proceeded, with the idea of appearing before the Committee as the concluding witness." This he undertook to do. (House Hearings, page 2857.)

No Increase of Power From 13 (4)—Commission Claimed.

In his opening statement Commissioner Clark called attention to the words "except as expressly provided in section 13 thereof," which the bill would introduce into the proviso in Section 1 (House Hearings, page 11). He also stated clearly the view that the Commission should be *charged with the duty and possessed of the power* to increase intrastate rates which the Commission found to create an undue burden on interstate commerce. (See his statement on page 74 of this brief.) He declared the opinion, however, that the "undue burden" words added nothing to the power of the Commission under the then existing law, saying that law forbade undue prejudice and preference, and that any undue burden would fall within that inhibition. (For his statement on this point see page 81 of this brief.)

His view on this point was sustained by Mr. Wimbish, whose statement concerning it will be found at page 82 of this brief.

"Undue Burden" Provision Opposed by State Authorities.

The state regulatory authorities, however, were apprehensive lest the words introduced a new element into the law, and might be held to empower the Commission to increase rates believed by the Commission unduly low, without proof of actual discriminatory effect upon the movement of interstate traffic from or to localities or persons. (The statement of the general solicitor of the State Commissions on this point will be found at page 69 of this brief.)

EVIDENCE BEFORE COMMITTEE AS TO LEGISLATION PROPOSED

THE CONDITION OF CARRIERS AND THE NEED FOR A GUARANTY DURING THE PERIOD OF READJUSTMENT.

Mr. A. P. Thom, General Counsel for the Association of Railway Executives, made a statement which was in part as follows, House Hearings, page 1270:

> "I wish to turn now to a different period, and that is, what shall be done with these railroads in order to sustain them in the period after they are turned back to their owners and before normal conditions are restored?
>
> "The situation is this, Mr. Chairman: When these railroads went into the hands of the National Government on the 1st day of January, 1918, it was costing them 76 cents out of every dollar to pay operating expenses and taxes, and they had 24 cents out of every dollar left for payment of interest, rentals, dividends, and so forth. In the year and a half which has since elapsed—and I am not speaking of the moment, because I have

no figures up to the moment—but my most recent information is that the expenses have so increased that, instead of its costing 76 cents to pay operating expenses and taxes, it is now costing 95 cents to pay operating expenses and taxes. So that instead of having 24 cents left they have 5 cents left. * * *

(1282) "So we ask that you continue the full standard return until you have reestablished a proper relationship between the revenues and expenses, so that these properties can sustain themselves, and that you allow not exceeding a year to your administrative body to do that. We think that is absolutely essential."

Honorable C. A. Prouty, former Interstate Commerce Commissioner, presented his views in writing, from which the following quotation is made, House Hearings, page 3158:

"Outline of a Plan for the Return of the Railroads to and Their Operation Under Private Ownership.

"After taking over the control of the railroads the Government made large increases in wages which, together with the increased cost of materials and supplies, resulted in greatly enhancing the cost of operation. Substantial advances in rates were also made, but the present indication is that the increase in rates was not sufficient to effect the increased expense of operation. If the results of the first three months of the present year be taken as an index, the Government will not earn what it is paying for the use of these properties by from $500,000,000 to $800,000,000.

"It must be remembered, however, that freight traffic has fallen off and that this unfavorable financial showing is undoubtedly due to a considerable extent to that fact. If the volume of

business were equal to that of a year ago, the net income would be much better than it is. It does not seem probable that it could be enough better to anything like take care of the entire deficit above stated.

"To turn these railroads back to their owners without providing some means by which adequate revenues will be provided would mean financial disaster to many, perhaps to most, of the carriers. This would be both wrong and foolish. Railroad securities are widely distributed among the general public. Industry and commerce can not permanently thrive and develop unless the condition of our railroads is fairly prosperous. * * *

"The problem is to devise some method by which under private ownership rates shall be established which will yield to the carriers a sufficient revenue without imposing upon the public an unjust burden. Moreover, that plan must be such as can be adapted to the present exigency."

INITIATION OF RATES BY THE COMMISSION; THE RULE OF RATE MAKING.

Judge Prouty's plan contemplated the granting of power to the Commission to initiate rates, under a general legislative direction as to the return to be provided. What he said on this point is as follows, House Hearings, page 3159:

"Rates to be fixed by the Interstate Commerce Commission. Such rates to be absolute, with no right upon the part of the carrier to vary up or down. * * *

"The right to initiate rates, supervised as it is by the Interstate Commerce Commission, has been for the last five years of no advantage to the carrier. No advance in rates has been made which could not have been secured by an application to the Commission for a change in the rate.

"The right to reduce the rate without leave of the Commission has not benefited the public, but has in the main proved a source of vicious discrimination and disorganization. * * *

"The railroads of this country should be self-supporting. To this end Congress should instruct the Interstate Commerce Commission to establish such reasonable rates as will yield a fair return upon the value for rate-making purposes which it establishes.

"The amount of this return ought not to be prescribed. In the nature of things it can not be the same upon the value of all carriers. To establish rates which would yield a given return, say 6 per cent, upon the value of the most fortunate carrier, would exact from the public too high transportation charges, while, upon the other hand, to maintain rates so low as to yield only an adequate return upon the value of the most fortunate carrier would be extremely unjust to its less favored competitors. The rates should produce an adequate return upon the average value affected by them."

Honorable Edgar E. Clark, present Chairman of the Commission, appearing for the Commission, testified at some length about the problem of strong and weak lines, and as to the desirability of a rule of rate-making, House Hearings, page 2862:

"Some propose that the Commission shall be charged with the duty to fix rates that will produce a certain minimum percentage on stated sums of investment or value. At the present time a carrier apparently has no legal protection against a prescribed rate unless it can show that the rate is confiscatory. Manifestly rates ought not to be so low as to barely escape confiscation of the carrier's property. It is in the public interest that the car-

riers should be permitted to earn reasonable returns upon the value of the property they devote to the public use. The question of what shall be the maximum or the minimum limit of those returns is one of public policy and not of administration * * *

(2882) "Mr. Sanders of Indiana. Mr. Clark, in line with some things you said this morning concerning rate-making, as I understand it, you stated this morning that the question of a fair maximum and minimum return, above the point of confiscation described in the Constitution, was a question of public policy and not an administrative question.

"Mr. Clark. What I undertook to say, Mr. Sanders, and what I am firmly convinced of, is that if there is to be a recognized standard of measurement for the return, either on the basis of the capitalization or the basis of the value of the property, or any other standard, that standard ought to be fixed by the legislature and not by an administrative tribunal, because, once fixed by the legislature, it will be there as the standard and the rule of law by which to administer it for all carriers alike, Whereas, if it is left to an administrative tribunal, there may be, and probably will be, considerations entering into different cases which it considers that would be extremely hard to analyze satisfactorily, and make clear why one standard was used in one case and another in another.

"Mr. Sanders of Indiana. Under the present law there is not any standard except what is fixed by the administrative body.

"Mr. Clark. The only standard is the rule of law laid down in the act to regulate commerce, that all rates and charges shall be reasonable and just.

"Mr. Sanders of Indiana. And, of course, there are constitutional qualifications; but above the point of confiscation, except for the rule that they must be reasonable and non-discriminatory, there

is no definite rate-making standard under the present law.

"Mr. Clark. None.

"Mr. Sanders of Indiana. Do you think there should be a standard fixed by Congress as a matter of public policy?

"Mr. Clark. I think in the light of recent events and present conditions, it would be a desirable thing.

"Mr. Sanders of Indiana. Of course, it would be difficult to fix a minimum for any one carrier.

"Mr. Clark. I do not think that you could. As I undertook to say to the chairman this morning with reference to a guaranty, any standard of earnings must be based, I think, on a group of carriers in a territory outlined in such manner as to make the carriers included in the group fairly comparable with each other in point of public service and those conditions which control rate-making in that section or territory. That is the trouble, if you will pardon me, with the present rule. When I say that is the trouble with it, I mean to say that it works this way: If the administrative tribunal is called upon to determine a reasonable rate on a given commodity between two certain points, it must do it in the light of all the circumstances and conditions that are presented, and as I pointed out this morning, the Commission has insisted always upon considering the conditions upon the roads that were less advantageously situated. That necessarily results, when a reasonable, maximum rate is prescribed in fixing the limit that any of the competitive roads between those two points can get. Some of them can put higher rates in their tariffs, but they will not carry the traffic, and thus it results that that rate, whatever it may be, produces a better and a more liberal return for one of those carriers than it does for another, dependent upon their physical conditions and the differences in the cost

to them of performing the service. * * *

"Mr. Sanders of Indiana. Then you really base it upon a fair, aggregate return?

"Mr. Clark. I think that is the only way a standard could be applied.

"Mr. Sanders of Indiana. Now, following that just a little further, when we undertake to fix a definite standard for rate-making, or a definite rule of rate-making, and we speak of a fair return, immediately the question comes up, What is to be the basis for the return? I presume it would ultimately be the property value?

"Mr. Clark. I should think so."

This evidence, taken in connection with Judge Prouty's statement just quoted, is most illuminating as to the matters intended to be covered by Section 15-a. It will be noted that nowhere in this connection did Commissioner Clark in any way indicate that the rule to be provided should extend the powers or the duties of the Commission as to intrastate rates.

Mr. Harry K. Wheeler, President of the United States Chamber of Commerce, testified, House Hearings, page 193:

> "The Chairman. As you have given a broad survey of the proposed plan, I wish to ask you some questions as broad as the scope of your own testimony.
>
> "On the 9th of June the Chamber of Commerce of the United States issued referendum No. 28, consisting of 10 questions, that were submitted to the organization members of the chamber. I am going over each one of these very rapidly. * * *
>
> (198) "Interrogatory 8: 'The committee recommends a statutory rule providing that rates in each traffic section shall yield an adequate return on a fair value of the property as determined by public authority.'

"That is where the bill and the conference plan are together. Now, do you believe in a strict guarantee by the Government?

"Mr. Wheeler. No; I do not.

"The Chairman. A return on capitalization, or a fair value, or anything of that kind?

"Mr. Wheeler. I do not believe in Government guarantee at all.

"The Chairman. The pending bill has nothing in the nature of a guarantee. It does, however, seek to establish the rule of rate-making, which may not be as embracing as some people desire. What is your statutory rule for rate-making? * * *

"Mr. Wheeler. The conference recommends that a statutory rule be enacted by Congress requiring that railroad rates and fares, to be established by public authority, shall be designed to yield the railroad companies in each traffic section of the United States (as shall be designed by Federal authority) aggregate revenue sufficient to produce, after proper provision has been made for renewals and depreciation, a net return (which shall be available for interest and dividends) of not less than 6 per cent per annum upon the aggregate fair value of the property of the railroads devoted to the public service in each of the several sections. The items of 'renewal and depreciation' shall also include unproductive improvements and properly chargeable to investment account and against which no capital or capital obligations shall be issued.

"The Chairman. Now, if that is the rule of rate-making, do you think that your provision for a division of the excess and the placing of it in the company contingent fund and a part in the Federal contingent fund leaves a sufficient incentive for the carriers?

"Mr. Wheeler. The conference thinks it does, Mr. Chairman."

Mr. Thom testified, House Hearings page 1220:

> "Now, how ought rates to be initiated? * * *
>
> "Manifestly, you can not require the Interstate Commerce Commission to create a system of rates that will produce a certain result and not give it the power of initiation. They must have the authority to initiate the system which will produce the results you tell them must be produced. They cannot, fairly, be blocked in the performance of this express statutory duty by withholding from them the power to initiate the very thing you require of them, and make that dependent upon the action of somebody else; and, consequently, the Commission must have the power of initiation to the extent that it is necessary to perform the duty you require of them.
>
> "We do not believe, however, that, in the interest of having a flexible and adjustable system of rate-making, there ought to be withheld from the carriers the power to initiate rates—the rates so initiated, however, to be subject to the action of the Interstate Commerce Commission."

Necessity for Fixation of Intrastate Rates During the Period of Readjustment.

Concerning the necessity for a provision fixing intrastate rates upon the then existing basis during a reasonable period of readjustment, Honorable Charles E. Elmquist, General Solicitor of the National Association of Railroad and Utilities Commissioners, testified as follows, House Hearings, page 1591:

> "One very important question that must be considered when the properties are returned to private operation is that of the status of the existing state as well as interstate freight and passenger

rates, classifications, and charges. This question has been given very careful consideration by our committee. * * *

"After considering the whole question, the State Commissioners attending the conference have reached the conclusion that the credit of the railroads, the interests of the shippers and of the country require for a certain time the stabilization of the rate structure of the country after these properties are returned, and therefore we suggest the following recommendation:

"'That the existing interstate and intrastate rates, fares, charges, and classifications initiated by the Director General may continue in force for a period not beyond July 1, 1921, unless sooner changed by the state or Federal authorities having control or jurisdiction of rates, fares, charges, and classifications, and that rates which have not been changed or approved on or prior to said date shall thereafter be of no force and effect and the rates in effect June 9, 1918, shall then be restored.'

"The purpose of this recommendation is quite apparent. * * * It enables the commissions to make suitable modifications of the freight and passenger rates or classifications or charges upon a hearing and as necessity requires; but actions taken by those bodies must be based upon the facts that are presented, due regard being given to the increased cost of operation, labor, and all the other things that must be considered whenever we have a rate question before us. This 18-month period after January 1 of this year will also enable the legislatures in the respective states which have passed 2-cent or 2½-cent passenger laws to consider what should be done with the passenger rates within those states."

Commissioner Clark testified, House Hearings, page 2953:

"There is a great difference of opinion among men and lawyers as to what will be the legal situation if the roads are turned back without some legislative expression by the Congress as to the status of rates then in effect. There would be no difficulty of that sort in connection with the interstate rates, because when the President acted through the Director General in the exercise of the powers conferred upon him by the Federal Control Act, we issued a general order in which we permitted the railroads that were not under Federal control to take like action with respect to joint rates between them and roads that were under Federal control, and we struck off the maintenance requirements of our outstanding and still effective orders, so there is not and has not been since that time any interstate rates on file with us by the Railroad Administration which would be in conflict with an outstanding and unexecuted order of the Commission. What I mean by that is an outstanding order, the time limit on which had not yet expired. But with regard to the state rates, very different situations would arise, as has been pointed out to you. Some of them are Commission made, some of them are legislatively made, and while there has been little disposition to challenge the action of the Federal Government while the roads were under its control, I think that if they were turned back without any expression by Congress, that there would be many instances in which these law questions would arise, and necessarily so.

"The Chairman. Do you think that could be cleared up by a declaration in the act itself?

"Mr. Clark. I do. I think that declaration in this act would be accepted by practically everybody for a reasonable period prescribed by the Congress as a part of the war program.

"Mr. Denison. You mean continue the rates, intrastate as well as interstate?

"Mr. Clark. Yes. I think that would be ac-

cepted in good faith by the state officers and the State Commissions."

Mr. Thom's testimony on this point is also quoted because it is evident, both from what he said, and from questions asked him by the Committee, that the only purpose in mind at the time the testimony in question was given, to be accomplished by a provision providing for fixation of intrastate rates, was to purevent automatic reductions during the readjustment period, covering which it was proposed that a government guaranty should be given. The purposes of the section providing for fixation was afterwards expanded by the Conference Committee, and the significance of the change will be later pointed out. Mr. Thom was speaking of the failure of the roads to make necessary returns, House Hearings, page 1282:

"So we ask that you continue the full standard return until you have reestablished a proper relationship between the revenues and expenses, so that these properties can sustain themselves, and that you allow not exceeding a year to your administrative body to do that. We think that is absolutely essential. * * *

"Mr. Denison. Do you think that the rates would go back automatically if we did not do that, if we do not provide in this bill for a continuation of the present rates?

"Mr. Thom. I think the state rates would. That is my individual judgment. At least it has been so held in the court in the State of Oregon. I do not think the interstate rates would. * * * but the situation is different as to state rates.

"Mr. Denison. Then, we will have to provide that the rates established by the Railroad Administration in the states will have to continue until

at least a year, unless earlier changed by the Interstate Commerce Commission. * * *."

CONFLICTING VIEWS AS TO REGULATION BY STATE OR FEDERAL POWER; RIGHT OF CARRIERS TO COMPLAIN OF INTRASTATE RATES.

On the subject-matter of intrastate rates, two diametrically opposed views were urged. The representatives of carriers, and some others, urged that the Commission should be granted power directly, or upon complaint or appeal, to fix all intrastate rates. On the other hand, with equal insistance, it was urged that no attempt should be made, or could lawfully be made, to invade the field of state regulation.

On this point Mr. Elmquist testified as follows, House Hearings, page 1616:

"Mr. Chairman, when we adjourned this morning I was about to discuss the amendments to section 13 of the act which refer to discriminations between state and interstate rates and the burden upon interstate commerce. * * *

(1617) "As the law now stands, State Commissions have exclusive control over intrastate rates, subject to the rule that rates must not be confiscatory, must not burden interstate commerce, or create an unjust discrimination between state and interstate commerce.

"Rates are intimately connected with the welfare and prosperity of industries and communities. Many local rates have no relation to through or interstate rates. The existence of discriminations between places or persons wholly within a state may have disastrous results, and it is important that local commissions should be in a position to promptly and effectively regulate these matters.

"One of the chief public benefits arises from the fact that these commissions, with their expert forces, have a thorough knowledge of local conditions and are in a position to dispose of 90 per cent of all complaints in an informal way. The greatest activity over rates has been found in the Central and Western States, which embrace a large territory and have a large and increasing volume of intrastate traffic. The development of the natural resources and the expansion of business in those states will undoubtedly require the continued exercise by local commissions of the power over intrastate rates. * * *

(1619) "Co-operation between the state and Federal authorities will quickly lead to a harmonious adjustment, where adjustment is necessary, and can be made, of state and interstate rates. In such cases the state commissions must be permitted to regulate purely intrastate rates and the Interstate Commerce Commission must regulate the interstate rates; each must exercise exclusive jurisdiction."

Statements in line with that of Mr. Elmquist, touching this point, were made by Samuel A. Cowan, representing the National Live Stock Association and the National Live Stock Shippers' League, House Hearings, page 886, and by Walter E. Gardner, representing the National Lumber Manufacturers Association, House Hearings, page 1987.

The carriers' views were stated by Mr. Thom in part as follows, House Hearings, page 2991:

"Now, Mr. Chairman, you recognize that in this bill which is pending before your committee, to a certain extent you give a supervisory authority to the Interstate Commerce Commission over state-made rates in certain instances. Our plea to you is,

in the first place, that there ought to be a complete and exclusive jurisdiction in the Interstate Commerce Commission to control all the rates of interstate carriers. It will not be possible, in our judgment, to have a mere supervisory authority and escape the consequences of a timid and meticulous administration of that part of the rate structure. There will always be a reluctance on the part of a body representing the Federal Government to establish and enforce a system different from that which is favored by a state government in respect to state rates. We can not escape the conclusion, if that matter is subjected merely to a supervisory power of the Federal Government, that there will ultimately, if not at first, be a reluctant exercise of that power, and we will have a strong, adequate exercise of the power in respect to interstate rates, so far as that is possible, and a reluctant exercise of that power when it comes to overruling the conclusions of a state commission as to state rates.

"We think commerce is of such importance and the success of whatever system you adopt is of such importance that it justifies a strong administration and not a reluctant administration, and therefore we earnestly hope that this committee will see that it is proper and in the public interest to regulate all the rates of an interstate carrier by one hand, and that the Federal hand.

"If, for reasons which you determine are controlling, you conclude that a supervisory authority is all that you can favor, then there are certain provisions to strengthen the suggestion which has been made in this bill and in the Senate bill which we want to bring to your attention. * * *

"Mr. Denison. Mr. Thom, I have always understood that the Constitution gives the Federal Government the right to regulate interstate commerce, and if I understand your position you are asking us to regulate intrastate commerce?

"Mr. Thom. No; I am asking you to regulate

the intrastate commerce, so far as it is carried by an interstate carrier. * * *

(2993) "Mr. Dewalt. In other words, you would go so far as to say that merely from the fact that the haul was made by a road engaged in interstate commerce, whether that haul was wholly within the state or partially outside of the state and partially inside the state, it should be governed by the Interstate Commerce Commission.

"Mr. Thom. Yes.

"Mr. Dewalt. I now understand you fully.

"Mr. Thom. That is my position, Judge.

"The Chairman. And also that the level of all intrastate rates should be raised to the level of interstate rates; does not that follow?

"Mr. Thom. Or lowered. They ought to be on the same level. * * *

(2994) "Mr. Denison. I want to ask you another question in that connection. Do you know of any railroad in the sense in which you use it which does not do an interstate business?

"Mr. Thom. Any railroad which does not do an interstate business?

"Mr. Denison. Yes, sir.

"Mr. Thom. I do not.

"Mr. Denison. Is it not your contention that all the railroad rates in the United States should be made by the Interstate Commerce Commission and none by the state commissions?

"Mr. Thom. I think that will eventuate as a consequence. * * *

(2996) "I want to say that, for the reasons I have indicated, we believe that there ought to be a strong and exclusive jurisdiction in the Interstate Commerce Commission. Suppose you take a different view, suppose there are considerations which you consider controlling that would justify a different view somewhat along the lines now in the two bills, then we propose this: We would propose that three things are necessary in connection with your suggestion of a supervisory power.

"One is that the carriers should have the right of complaining of inadequate state rates as well as any other interested party.

"Another is that it is essential that you do not confine what you propose to a supervision of the discriminatory character of rates, but that you should also extend it so as to provide for the case of undue inequality of rates, and therefore unjust inequality of burden of sustaining the interstate carrier.

"And the third is that you can not have an efficient method of dealing with this subject unless you confer upon the Interstate Commerce Commission the power of suspension of the state rates in cases considered by it proper, pending its final consideration of the subject, and that provision be made for reparation in case that the suspension be thereafter found to be ill-advised. Unless they have this power of suspension and to put into effect meanwhile the same level of rates on state traffic that there is on interstate traffic, how are you going to deal with this period of restoration, which is a temporary period?"

The Commission did not advocate the "dissolution or deposition of the state commissions," but did think it should have power to set aside state regulations resulting in undue prejudice or burden. On this point Commissioner Clark stated, House Hearings, page 96:

"Mr. Sims. Now, there is one more question I want to ask, and that will be all so far as I now see: Do you, or do you not, think that the legitimate powers of state commissions and of the state legislatures—and when I say 'legitimate' I mean the powers that the states have under the Federal Constitution—should be restricted, reduced, or eliminated?

"Mr. Clark. Our position with regard to that,

I think, is very definitely shown in the terms of this bill, which we approve, and in the explanation that I have made of our understanding of the proper interpretation and application of it. We have never advocated the dissolution or deposition of the state commissions from all their regulatory authority. We do not advocate that, because we do not believe it would produce the best results. But, in so far as there is a conflict between state regulation and Federal regulation which results in undue prejudice against interstate shippers or communities or *lays an undue burden on interstate commerce*, we think that the Federal tribunal should be charged with the duty and possessed of the power to require its removal."

This provision enabling the Commission to remove "undue burden," Commissioner Clark regarded as the full equivalent of the right of appeal, House Hearings, page 2936:

"Mr. Denison. What would you think of a proposition by which a rate is promulgated either by a state commission or the railroads and the rate is filed by the carrier with the Commission and a ruling had on it with a direct appeal allowed from the decision of the state commission, where a Federal question is involved, a direct appeal to the Interstate Commerce Commission where a Federal question is involved, and by Federal question I mean a question that it may be claimed by the carrier relates to interstate commerce. In other words, if the carrier should claim that the rate established by the state commission comes within the rule laid down in the Shreveport case a direct appeal be allowed in that class of cases from the state commission to the Interstate Commerce Commission?

"Mr. Clark. Well, if there is an allegation of

undue preference of state traffic and undue prejudice of interstate traffic, I do not at the moment see any substantial difference between allowing it to be brought before our Commission on complaint and bring it there on appeal."

He believed section 13 (4) did not extend the Commission's power (see his further statement on page 81 of this brief).

On the point of giving carriers the right to make complaint of alleged discriminations, Mr. Elmquist (when he was objecting to any grant of power to the Commission over state rates other than that which it already had to remove discriminations) was inquired of and answered as follows, House Hearings, page 1621:

"The Chairman. In that regard, would you be in favor of giving to the railroad companies the right of making complaints?

"Mr. Elmquist. I do not think that amounts to very much, because the carriers always go to some shippers organization or to some community and get a complaint filed. They never have any trouble getting a case started.

"The Chairman. They seem to insist upon the right and an amendment was suggested to that paragraph by one of those representing the railway executives asking that the carrier be given the right to make a complaint.

"Mr. Elmquist. That particular point has not been discussed by our conference, Mr. Chairman. My own personal opinion would be that the carrier does not need that right."

Conflicts Between Interstate and Intrastate Rates; How to be Removed.

Upon one important point with respect to intrastate rates there was agreement between the Federal and state commissions and shippers, and to express disagreement, so far as our inspection of the record of the hearings indicates, on the part of the carriers.

In its annual reports in 1916, 1917 and 1918, the Commission had recommended to Congress that it be given specific authority to co-operate with state commissions for the removal of conflicts betwen state and interstate rates.

In 1916, Honorable B. H. Meyers, then Chairman of the Federal Commission, in an address before the National Association of Railway and Utilities Commissioners, had discussed the proposition as follows:

> "Every state commission directly involved would be given an opportunity, in accordance with law, to participate in the deliberations and to assist in formulating the final conclusions upon a record jointly made. The one rate within the zone of reasonableness, established through the joint efforts of the respective commissions, would then apply to all business, state and interstate, and thereafter there could be no Shreveport case in that territory and with respect to that commodity."

The National Association of Railway and Utilities Commissioners in the following year, and also in 1918, passed resolutions favoring the proposition.

These resolutions, Chairman Meyer's address, and the recommendations of the Federal Commission, were placed before the Committee by Mr. Elmquist, House Hearings, page 1617.

It will be interesting to note the recommendations of the Commission with some particularity. In 1916 the Commission said:

> "We believe that without abdicating any of the essential authority to finally control questions affecting interstate and foreign commerce, we should be authorized to co-operate with State Commissions in efforts to reconcile upon a single record the conflict between state and interstate rates."

In 1917 the Commission repeated its recommendation of 1916 and said further:

> "With the view of promoting this kind of co-operative action hearings have been held in half a dozen different states, which were in fact, although not in law, joint hearings of the interstate and the respective state commissions. In one instance these hearings extended through many weeks, and while the controversies in question have not yet been disposed of, we believe that what has already been accomplished has been distinctly in the interest of the affected parties, and that a proper basis has been laid for final disposition of questions which have vexed the citizens and authorities of the respective states as well as the carriers operating under these conditions, so that it will be possible for us to carry these proceedings to a final conclusion with substantial harmony of action on the part of the respective authorities. Very recently similar joint hearings have been provided for in connection with proceedings in which two different state commissions are directly interested."

In 1918 the recommendation was much more brief, and upon a critical reading might have been perceived

to slant towards the position which we have seen the Commission took when it came to the exposition of the recommendations. Conflict between state and Federal commissions in the "twilight zone" of jurisdiction was to be eliminated by giving the latter absolute power there. But the state commissions were to be permitted to remain upon the ground till questions of right arose, and even then they were to be conferred with, and treated with every consideration. This recommendation was as follows:

> "The establishment of a relationship between Federal and state authorities which will eliminate the twilight zone of jurisdiction, and under which a harmonious rate structure and adequate service can be secured, state and interstate."

Commissioner Clark, referring to the 1918 recommendations, said, House Hearings, page 26:

> "Section 13 of this act amending section 13 of the Commerce Act relates to the jurisdiction of the Commission, general rules of conduct, and so forth, involving the question of the relationship of states and interstate rates. It will be noted that the proviso in section 1, to which I referred yesterday, refers to that which is expressly provided in section 13. I doubt if it is necessary, Mr. Chairman, for me to detail much of the history of this situation as it has developed from the original decision and the supplementary decisions and reports of the Commission in the so-called Shreveport case, and the decision of the Supreme Court sustaining the Commission.
>
> "The law as it now stands and as it is interpreted by the Commission and by the Supreme Court authorizes the Commission to require the removal of undue preference or undue prejudice and to cor-

rect differences between the levels of state and interstate rates, in doing which it must prescribe the reasonable maximum interstate rates, and thus, by a roundabout process, it results that the Commission fixes the level of the maximum reasonable interstate rates and requires the removal of the undue preference and undue prejudice found to exist under the state rates, which gives the carrier authority to increase, if necessary, or if it so elects, the state rates to the level of the interstate rates as found reasonable."

"This amended provision would require the Commission when an investigation of this character was instituted, to cause the state or states to be notified of the proceedings. It would authorize the Commission to confer with the authorities of any state having regulatory jurisdiction over the class of persons and corporations subject to this act with respect to the relationship of the rate structures and practices, and would authorize and empower the Commission, under rules prescribed by it, to hold joint hearings with any such state regulating bodies on any matters wherein the Commission is empowered to act, and where the rate-making authority of a state is or may be affected by the action taken by the Commission. It would authorize our Commission to avail itself of the cooperation, services, records, and facilities of such state authorities in the enforcement of any provision of this act. This section confers upon the Commission authority—

'after full hearing, to make such findings and orders as may, in its judgment, tend to remove any undue preference or prejudice as between persons or localities in state and interstate or foreign commerce, or any undue burden upon interstate or foreign commerce, which is forbidden and declared to be unlawful, and provides that such findings or orders shall be observed while in effect by the carriers parties to such

proceedings affected thereby, any act, decision, or order of any state or state authority to the contrary notwithstanding.'

This situation has been more or less troublesome. * * *

(27) The idea under the proposed amended act is that every reasonable, feasible effort shall be made to bring the conflicting views of the state commissions, if they do not conflict, and the views of our own Commission into harmony through a very careful investigation which all are invited to participate in, and in which everybody would be heard, and in which every reasonable effort would be made to reach a mutually acceptable understanding; but the possibility of inability to reach such an understanding would be protected by a reservation of the power to finally decide it, if necessary, by the Federal tribunal."

Commissioner Clark further testified on this point as follows, House Hearings, page 110:

"Mr. Sanders of Indiana: Mr. Commissioner, I wish you would be kind enough to state for the record the power that was recognized in the Commission by the Shreveport case.

Mr. Clark: The power to require the removal of undue prejudice against interstate shippers resulting from the application to intrastate traffic of a scale of rates prescribed by the state Commission and the maintenance of higher rates on interstate traffic over the same line for corresponding distances and under substantially similar circumstances and conditions.

Mr. Sanders of Indiana: Section 13 of this act, which proposes to amend Section 13 of the original act, deals with that question of additional power which Section 13 gives the Interstate Commerce Commission.

Mr. Clark: I do not think that it gives us any more power under the law. I do not think it expands or contracts the application of the terms of the law or the Commission's power thereunder, but it does define a relationship and outline a procedure that we hope will operate to minimize the number of instances in which undue prejudice will persist, and to simplify the removal of it where it may be found to exist.

Mr. Sanders of Indiana: Would it have to be initiated in much the same way as it is?

Mr. Clark: *At once under this system we would have co-operation between the Federal and state commissions, and a situation that was known to be unsatisfactory and which was a subject of informal complaint might be taken up for consideration in advance of a specific formal complaint.*"

On a later day, Mr. Denison of the House Committee returned again to this question, and Commissioner Clark testified as follows, House Hearings, page 2962:

"Mr. Denison: Mr. Clark, *does Section 13 of the pending bill confer any power upon the Interstate Commerce Commission that is not expressly and definitely within the principles announced in the Shreveport case?*

Mr. Clark: *I do not think it does, Mr. Denison, I think all of the powers that this confers upon the Commission are possessed by the Commission now under the law as interpreted by the Supreme Court.*

Mr. Denison: Does the court use the words, 'undue burden'?

Mr. Clark: No, sir.

Mr. Denison: Do not you think that the expression 'any undue burden upon interstate commerce' may, under the modern tendency of the courts, open up a great deal of speculation and extension of powers?

Mr. Clark: Well, we have used that phrase in our reports and findings and in some investigations. We have found that the rates were unduly prejudicial against interstate shippers, cast an undue burden on interstate commerce and were unduly preferential to state shippers.

Mr. Denison: Yes; but you use the word prejudice also, and then these words are used, 'any undue burden upon interstate or foreign commerce' as indicating something else.

Mr. Clark: I think it does mean something different, because under a line of state rates, compared with interstate rates, if the interstate rates are, say, 100 per cent greater than the state rates and there is a large volume of tonnage moving intrastate it might be that the unduly lower rates cast an undue burden upon interstate commerce, although no specific instance of undue preference or prejudice of a particular shipper or locality was alleged or at issue, but there would be a prejudice against a particular kind of traffic which the law condemns and a preference of a particular kind of traffic. * * *

(2964) Mr. Denison: Please give an illustration of what would be a burden upon interstate commerce as that term is used.

Mr. Clark: *An unreasonably and unduly low level of rates within the state which were not at the same time alleged to be or shown to be unduly preferential of or unduly prejudicial against any particular persons or community.*"

In Judge Prouty's plan the following appears, House Hearings, page 3159:

"State rates to be fixed by the Interstate Commerce Commission in collaboration with the state Commission, or perhaps by the state Commission with the right of appeal to the Interstate Commerce Commission. * * *

(3160) While the intrastate rate presents many difficulties in the solution, they are not at all insuperable. If some plan of actual co-operation can be put into effect they will disappear."

On this point Judge Cowan testified as follows, House Hearings, page 886:

"Mr. Sanders of Indiana. Is there any distinction, from a constitutional standpoint, between the power exercised by the Interstate Commerce Commission in the Shreveport case, and a direct power given by Congress to the Interstate Commerce Commission to control all the rates of carriers engaged in all interstate commerce; that is, from a purely constitutional standpoint?

Mr. Cowan: I think not. * * *

Mr. Sanders of Indiana: And from a constitutional standpoint, an act of Congress would provide for complete control just as well as they can provide a bill by which they can indirectly control?

Mr. Cowan: Absolutely. I think all of this can be avoided. * * * Give to the Interstate Commerce Commission the power and make it its duty to fix all the rates, leaving the states to act as they now do, fix the rates within their jurisdiction and when that is done, providing for co-operation, as you have provided for it here. Then they will have ironed out and prevented these conflicts of jurisdiction in advance. * * *

(888) "I say it would eliminate it if the Interstate Commerce Commission and the state commissions fixed all the rates, the discrimination would never come up; they would arrange it in advance; that is to say, they would have eliminated the chance of discrimination.

I believe nearly everybody wants to avoid this unseemly discrimination that sometimes seems to exist, not nearly, however, so much as is commonly talked about, but it does exist in certain cases."

Mr. William A. Wimbish, representing the Southern Traffic League, made a statement as follows, House Hearings, page 483:

> "Our position is that the law as it now exists affords adequate remedies against unjust discriminations affecting interstate commerce.
>
> In all such cases the prejudiced shipper or community may make complaint to the Interstate Commerce Commission, which has ample power to determine whether the discrimination is unjust, and if so found to order its removal. The exercise of this power by the Commission has been considered and approved by the Supreme Court in a series of cases, beginning with the Shreveport case, 234 U. S., 342.
>
> What then may Congress be called upon to do? Shall it forbid all state rates that are lower than interstate rates, even though they work no injustice? * * * There is no half-way ground; unless the power of the state over its domestic commerce be preserved in its integrity, the fabric will be shattered.
>
> But, say some, these lower schedules of rates cast an unjust burden upon interstate commerce, for that it requires interstate rates to be maintained at a higher level than would otherwise be necessary to produce revenues adequate to the needs of the carrier. Hence, they argue, the power of the states to make such rates should be annulled.
>
> This argument defeats itself. If in fact the lower state rates do cast a burden upon or operate to the prejudice of interstate commerce, it is now an unlawful thing which the courts will restrain upon proper application and proof.
>
> Would it be unwarranted or unkind to draw the conclusion that what the carriers and their secur-

ity owners really seek is to rid themselves of the restraint of state regulation, so that state rates may be advanced in those cases where they happen to be lower than interstate rates? If advances in state rates be permitted, will the carriers make any compensating reductions in interstate rates so as to relieve the supposed burden upon that commerce? Can one burden be relieved by increasing another, in the absence of any injury to the shipper?

A little clear thinking makes it plain that lower state rates can not cast a burden upon interstate commerce or impede its flow unless such commerce is injuriously affected; and that can be truly predicated only of such state rates as may constitute an unjust discrimination against shippers in interstate commerce and the localities in which they do business.

How is it possible, may I inquire, that a burden be cast upon interstate commerce, dissassociated from those who engage in interstate commerce? Interstate commerce is not a living thing. It is not an entity. It is merely a channel, an avenue, an instrumentality. Unless some impediment is placed upon the free flow of that commerce, which would prejudice the shipper or the community, then to my mind it is impossible to see that any burden has been cast upon anybody. Now, if there be such burden, it must arise at last, from unjust discrimination. If such unjust discrimination exists, the legal remedy now is adequate, and I hardly see how you can improve it by legislation."

This proposition to give the Commission full power over all intrastate rates was strongly opposed by Mr. Elmquist, representing the state commissions, and by Judge Cowan and others. (See evidence on pages 69 and 70 of this brief.)

The Committee appears to have accepted the view expressed by Commissioner Clark and Mr. Wimbish *that the addition of the words "undue burden" would not enlarge the power of the Commission.* They evidently *did not desire, however, to leave ground for claiming that it was the intent of the Act to extend such power into the field of purely intrastate commerce.* Accordingly, *the Committee struck out from the paragraphs amendatory of Section 1 the words which proposed to introduce an exception into the proviso protecting intrastate power.*

PARAGRAPHS (3) AND (4) OF SECTION 13 IN H. R. 10453.

The Committee reported the bill as H. R. 10453. In that bill the two paragraphs proposed to be added to Section 13 of the Commerce Act were found in Section 415. So far as there is occasion to reproduce them here, said paragraphs in the bill as reported were as follows:

> "(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, *which petition is hereby authorized to be filed,* there shall be brought in issue any rate, fare, charge, classification, regulation or practice made or imposed by authority of any state, the Commission, * * *
>
> (4) The Commission shall have authority, after full hearing, to make such findings and orders as may in its judgment tend to remove any undue advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any *undue burden upon interstate or foreign commerce,* which is hereby forbidden and declared to be unlawful,

> and such findings or orders shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any state or the decision or order of any state authority to the contrary notwithstanding."

It will be remembered that Judge Thom, for the carriers, had made request of the Committee (1) to give the Commission "strong and exclusive jurisdiction" over intrastate rates, or (2) a supervisory power over such rates, and in the latter connection (a) that the carriers be given the right of complaint, (b) that the Act should not "confine what you propose to a *supervision of the discriminatory character of the rates*, but that you also *extend* them so as to provide for the case of *undue inequality of rates*," and (c) that the Commission be granted power to suspend such rates pending investigation (see his statement, page 73 of this brief).

It is evident that the Committee saw fit to grant the request made for carriers to the extent of giving them the right to make complaint, but no further.

If it shall be argued that the concluding words of paragraph (4) "and such findings or orders shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any state or the decision or order of any state authority to the contrary notwithstanding," indicated an intention to invade the state field of regulation, it is a sufficient answer to point out that the orders to be observed are those only of the character described in the preceding portion of the paragraph and that the words can in no way amplify the authority of the Commission. They were appropriate words to incorporate as part of a section which did to an extent give the Com-

mission power to make rates within a state, which it did not have before,—that is, the right to make the rates which carriers should substitute for rates found to be discriminatory. To this extension of power it does not appear that there was objection from any source. (See statement of Mr. Elmquist on page 75 of this brief.

COMMITTEE REPORT ON SECTION 13 (3) AND (4).

That it was not the intention of the Committee to extend the power of the Commission beyond what it had been held to be in the Shreveport case, is made plain by the Committee report which accompanied the bill. On this point the report said, at page 20:

> "ADJUSTING CONFLICTS BETWEEN INTER AND INTRA-STATE RATES.
>
> "Whenever, in any investigation under the provisions of the Commerce Act, or in any investigation instituted upon petition of the carrier concerned, there shall be brought in issue any rate, fare, charge, classification, regulation or practice made or imposed by authority of any state, the Commission (Sec. 415) before proceeding to hear and dispose of such issue shall cause such state or states to be notified of the proceeding. The Commission can ask the state regulatory body to 'sit in' with it and hold joint hearings and to avail itself of the co-operation, services, records and facilities of such state authorities. After such hearing the Commission shall make such findings and orders as may in its judgment tend to remove any undue advantage, preference or prejudice as between persons or localities in state and interstate or foreign commerce. The provision

practically enacts into law the decision of the Supreme Court in the so-called 'Shreveport' case. Any undue burden upon interstate or foreign commerce is forbidden and declared to be unlawful. It is believed that the provisions of this section will have a beneficial and harmonizing effect and will tend to reduce the number of so-called 'Shreveport' cases, while at the same time recognizing the regulatory bodies of the several states."

REPORT OF HOUSE COMMITTEE ON S. 641, EXPLICITLY RESTORING STATE POWER DURING FEDERAL CONTROL.

The disposition of the Committee not to encroach upon the power of the states with respect to intrastate rates was also made entirely clear while the hearings were in progress.

On June 13, 1919, Senator Cummins introduced a bill, S. 641, entitled "An act to amend Section 10 of an Act entitled 'An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners and for other purposes,' approved March 21, 1918." This bill had passed the Senate and had been referred to the House Committee on Interstate and Foreign Commerce. As it passed the Senate it provided in part as follows:

"That during the period of Federal control the right to initiate or change rates, fares, charges, classifications, regulations and practices exercised by the carriers now under Federal control, prior to the 29th day of December, 1917, shall hereafter be exercised by the President, or by the Director General of Railroads, but such right as to interstate commerce shall be exercised under all the

limitations and conditions which were imposed upon said right by the Act to regulate commerce, approved February 4, 1887, as amended; and the Interstate Commerce Commission shall have as full and complete authority and jurisdiction to set aside, change, modify, suspend or otherwise review all such rates, fares, charges, classifications and regulations directly affecting interstate commerce as though the Government had not assumed the possession and control of said transportation systems; *Provided, That no intrastate rate shall be increased until at least thirty days' notice of the proposed increase has been given to the shippers of the state in which the increase is proposed and a hearing granted.* To that end the said Act to regulate commerce, as amended, is hereby declared to be in full force and effect with respect to rates, fares, charges, classifications, practices and regulations, anything in the Act approved March 21, 1918, to the contrary notwithstanding."

On August 13, 1919, the House Committee reported the bill, accompanying it with a written report, No. 230. This report stated that the bill was returned "with sundry Committee amendments with the recommendation that the amendments be adopted and that the Act as amended do pass."

As to the part of the bill above quoted, the report was in part as follows:

> "On page 3, line 14, the committee amendment strikes out commencing with the word 'Provided' to and including the word 'granted,' in line 18, and inserts:
>
> '* * * *Provided, that no change or increase shall hereafter be made in intrastate rates,*

fares, charges, classifications, regulations or practices without having first secured the approval of the proper state regulating tribunals conformable to the laws of the several states.'
* * *

With reference to the second part of the amendment it will be noted that the act as it passed the Senate leaves the power to initiate intrastate rates, etc., in the President or Director General of Railroads and gives to the Interstate Commerce Commission its original jurisdiction over interstate rates, but as to the intrastate rates the initiation and regulation of the rates, etc., remain the same, except that no intrastate rate shall be increased until at least 30 days' notice of the proposed increase has been given to the shippers of the state in which the increase is proposed and a hearing granted.

The committee is of the opinion that jurisdiction over any new intrastate rates should rest with the state regulatory bodies. These tribunals are in close touch with transportation in their respective states and can give intelligent and prompt consideration of the questions presented by any proposed change. It will be noted that no power is given by the proposed committee amendment to the state commissions to investigate or in anywise interfere with the present rate structure, but their jurisdiction relates alone to future changes or increases. The Director General has been following the practice of consulting with state commissions and stated to the committee:

'In addition to that, it has further been our policy with respect to intrastate rates, in every case where it was at all possible, to keep in touch with the state railroad commissions and get the benefit of their advice.' (Hearings, p. 48.)

The Interstate Commerce Commission would still, of course, have jurisdiction over intrastate rates affecting interstate commerce, when the facts came within the rule laid down in the Shreveport case."

There was, so far as the report shows, no dissent.

When discussing H. R. 4378, Mr. Elmquist made reference to this report, and statement was made from the Committee as to its position with respect to intrastate rates as follows, House Hearings, page 1616:

"Mr. Elmquist. Mr. Chairman, when we adjourned this morning I was about to discuss the amendments to Section 13 of the act which refer to discriminations between state and interstate rates and the burden upon interstate commerce.

Your committee in a report written by the Hon. Mr. Sanders of Indiana, on Senate bill 641, known as the Cummings bill, stated, on page 5, as follows:

(Reading from Committee report.)

Mr. Sanders of Indiana. Just for the record, Mr. Elmquist, I might state that *I was in that report stating the views of the committee* and not my individual views, so far as that part of it is concerned. Personally, I think *during Federal control* the power should rest with the Interstate Commerce Commission.

Mr. Elmquist. *I take it that the declaration as to the state rate-making power represents the opinion of the committee as such.*

Mr. Sanders of Indiana. *It does.*

Mr. Elmquist. And therefore it will be unnecessary for me to make a constitutional argument to show that under the tenth amendment the question of intrastate rates is reserved to the states."

There was no dissent, nor intimation from the Committee that there was occasion to discuss the question thus suggested, and Mr. Elmquist proceeded.

MEMORANDUM FROM STATE COMMISSION PRESENTED TO CONFERENCE COMMITTEE ON SECTION 13 (4).

The state regulatory authorities were, in spite of the views expressed by Commissioner Clark and Mr. Wimbish, nevertheless concerned lest the words "undue burden" in Section 13 of H. R. 10453 as reported, might be held to extend the power of the Federal Commission, and they continued their opposition. When the bill came into the hands of the Conference Committee of the House and Senate, a memorandum was filed by the National Association of Railway and Utilities Commissioners, in part as follows:

> "DEPRIVATION OF STATE COMMISSIONS OF THEIR PROPER POWERS.
>
> By paragraphs (3) and (4) of section 13 of the Commerce Act, as proposed to be amended by section 415 of the House Bill, the same appearing on pages 61 and 62 of the Bill as printed under date of December 20, 1919, it is provided that whenever the Interstate Commerce Commission shall investigate 'any rate, fare, charge, classification, regulation, or practice made or imposed by authority of any State * * * the Commission shall have authority * * * make findings and orders * * * to remove * * * *any undue burden upon interstate or foreign commerce* * * *. The law of any State or the decision or order of any State authority to the contrary notwithstanding.'
>
> If this provision shall become law it will oper-

ate to *deprive the State Commissions of their powers to make with final effect any rate, service or other regulatory order.*

We make this subject the first for discussion in this memorandum because we deem it of most vital importance to the State Commissions and to the people of the States whose interest they represent.

The question involved is whether Congress desires to preserve the powers of the State Commissions or to destroy them. We are satisfied that neither the House nor the Senate intends to take the latter action, and that the language of the House Bill here pointed out and protested against was adopted without a clear perception of its effect. We make the following suggestions:

"1. The State Commissions are absolutely necessary to shippers as local tribunals to which appeals may be quickly and inexpensively taken upon local matters.

"2. If the provision of the House Bill becomes law, every order of a State Commission affecting either rates or service or in the nature of a police regulation will be subject to be set aside as the result of a second trial before the Federal Commission.

"3. The inevitable result will be to burden the Interstate Commerce Commission with a great number of proceedings relating to purely local matters. If there were no other objection to thus extending the jurisdiction of the Federal Commission so as to make it in effect an appellate tribunal for all of the State Commissions, the great amount of additional litigation which will thus be brought before the Federal Commission, and which will unavoidably result in delaying its determination of more important matters, ought to be a conclusive reason against the proposed extension, unless some very distinct and important public advantage is to be gained thereby.

"4. Instead of public advantage, such extension of jurisdiction of the Federal Commission will result in distinct and important injury to the public interest. The special advantage to the public from the existence of State Commissions with power to act on matters local to the states are (1) that they can be easily appealed to at little or no expense, (2) that they can act promptly, and (3) that they can act understandingly, because of the intimate knowledge which the State Commissions have of the reasonable requirements of local situations.

"5. Matters upon which State Commissions act are often—ordinarily, we may say—not important enough so that the shipper affected can afford the time or the cost which would be necessarily involved in proceedings before the Federal Commission to test the reasonableness of orders of the State Commissions. It is also true that they are not important enough so that ordinarily they can be expected to receive the personal attention of the Interstate Commerce Commissioners. The appeal (for in practical effect that is what the Act will give) will therefore be from competent State Commissioners familiar with local conditions to Examiners or other subordinate employees of the Federal Commission, who have not the experience, or the local knowledge of the State Commissioners.

"6. Moreover, the lawfulness of any order of any State Commission can now be tested in either State or Federal courts, where the order is made, for both State and Federal laws provide the railroads full protection in the courts against either unlawful or unreasonable orders by State Commissions. If the proposed provision becomes law, the people of a state may be compelled to cross the continent to defend the orders of their State regulatory bodies, and they may see such orders set aside, not because they are unlawful, but be-

cause some Examiner of the Federal Commission, exercising its power, differs in judgment with the local officials. Heretofore the Federal system of government has worked well because the right of the states to regulate their local affairs has been respected. Now it is proposed to enact a statute which will destroy the powers of long-established local tribunals, and subject the people of the States to the findings and orders nominally of the Interstate Commerce Commission, but actually (by reason of the very multitude of cases which will arise) of the subordinate employees of that Commission. * * *

"7. Under the language protested against any order or regulation of a State Commission as to rates, service or facilities will be unlawful if found and declared by the Federal Commission to be an 'undue' burden. Any order which involves cost to a carrier is a burden on all commerce moved by that carrier whether intrastate or interstate There is no definition of the word 'undue' as used in the Act. It is impossible to know what meaning may in the course of litigation finally become attached to it. Ordinarily, however, the conclusion of the Federal Commission will be final so far as shippers are concerned, and any order involving cost which the Examiner hearing the case deems undesirable will be found by him to cause an 'undue' burden, and will by that mere finding, and the issuance of an order accordingly, come to be unlawful. Upon this point we can not over-emphasize the opposition of our organization to the language of the Bill."

"UNDUE BURDEN" PROVISION STRUCK OUT BY CONFERENCE COMMITTEE.

The Conference Committee struck out from paragraph (4) the words "undue burden" and wrote in their place "undue, unreasonable or unjust dis-

crimination," thereby making clear an intent to confine the operation of the law to what Judge Thom called "the discriminatory character of the rates," and not to extend it to what he called "undue inequality of rates" (see his statement on page 73 of this brief). In such form the paragraph became, so far as its effect upon State power of rate regulation was concerned, a mere restatement of the effect of Section 3 of the Act, and left untouched the reserved power of the States over rates on traffic within their own borders, other than as such power was before limited by Section 3 of the Commerce Act.

Origin of Words "Undue, Unreasonable, or Unjust Discrimination."

These words "undue, unreasonable or unjust discrimination" were taken from section 43 of a bill which had been introduced by Senator Cummins, known as the Cummins Bill, being S. 2906. This bill had passed the Senate as an amendment to H. R. 10453, and was under consideration by the Conference Committee. Section 43 proposed to amend Section 13 of the Commerce Act substantially as did Section 415 of H. R. 10453, except that the quoted words stood in the place of the words "undue burden."

S. 2906 was introduced on or about August 25, 1919, and various portions of H. R. 4378 were incorporated in it, with or without changes.

State Power Expressly Preserved.

It may be said further that S. 2906 contained no reenactment of the proviso of Section 1 of the Commerce Act, but that the intent to respect State power and

jurisdiction was expressed in the concluding sentence of the amendment to Section 13, which was as follows:

> "Nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police powers of the several States, including the power to make and regulate intrastate rates, except as in this Act otherwise provided."

The Conference Committee determined to express the intent of these words by the reenactment of the proviso to Section 1 in the form in which that proviso was carried in H. R. 10453, and accordingly the words just quoted did not appear in the Transportation Act as passed. The proviso of Section 1 was reenacted as follows:

> "The provisions of this Act shall * * * not apply—
>
> "(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid."

When the Conference Committee reenacted this proviso, no longer as a proviso, but as a direct declaration, it, of course, did so with full knowledge of the fact that this Court, in its opinion in *The Minnesota Rate Cases*, 230 U. S., 352, 418, had declared that the proviso in Section 1 was intended by Congress to define the "scope of its regulation," and to exclude from the provisions of the Act transportation "wholly with-

in one State." *The reenactment, therefore, of the proviso constituted a particularly emphatic declaration of the intent of Congress not to encroach upon the field of State regulation beyond the extent to which it had originally done so indirectly by the prohibition against discrimination in Section 3,* which was to be reaffirmed in what is now paragraph (4) of Section 13.

SENATE COMMITTEE CONSTRUCTION OF "UNDUE, UNREASONABLE OR UNJUST DISCRIMINATION.

Returning now to the words "undue, unreasonable or unjust discrimination," when S. 2906 was before the Senate, the Chairman of the Senate Commitee on Interstate Commerce, while explaining the bill to the Senate, said:

> "I call attention next to section 43 which presents also a long standing controversy and a most important one, and upon which Senators will have, I am sure, decided opinions. * * *
>
> "For years there has been a conflict between the jurisdiction of the Federal Government and the jurisdiction of the State Governments with regard to the adjustment of rates. All of you know that the Constitution of the United States confers upon Congress the authority to regulate commerce among the states and with foreign nations. *Obviously this authority is limited to the regulation or control of interstate commerce and matters that are inseparably connected with or incident to interstate commerce.* The Supreme Court of the United States has had occasion in at least three separate cases to discuss the subject.
>
> "Most of you, I am sure, are familiar with what is known as the Shreveport decision" (see Congressional Record, Vol 59, p. 143).

He then described in a general way the Shreveport decision, the Minnesota Rate Cases and the Illinois situation, and then proceeded to say:

"The *committee has attempted to simply express the decisions of the Supreme Court of the United States. We have not attempted to carry the authority of Congress beyond the exact point ruled by the Supreme Court in the cases to which I have referred;* and the only thing we have done in the matter has been to confer upon the Interstate Commerce Commission the authority to remove the discrimination, when established in a proper proceeding before that body—an authority which it does not now have." * * *

"I may say, for the benefit of the Senate, and especially say to the Senator from Tennessee; that the House bill originally proposed another element; that is, it proposed that we should declare that if the rates in force in any State did not sustain a fair share of the burden which the interstate carriers must bear, then the Federal authority should have the jurisdiction to take possession of the entire field and lift the rates so that the carrier should receive from intrastate business a proper share of the revenues which it must have in order to pay for maintenance and operation and a fair return upon the value of the property. That is the contention, and there is a great deal of merit in it. We have not thought, however, that we were justified in going to that extent. But I predict that it will not be many years before Congress will be compelled to go to that length. * * *

"But I do not want it to be understood that we have yet gone, and this bill does not propose to go, to the limit of our constitutional power. It leaves with the State authorities many things which, in my judgment, if we were to exercise our full power we could withdraw from the States. But the com-

mittee has not considered it wise to withdraw more than seemed to be absolutely necessary under existing conditions. At any rate, Senators will now fully understand. I think, the operation of the section to which I have referred." (Congressional Record, Vol. 59, Part 1, pp. 142-143.)

"There were numerous controversies of a vital character with respect to the sections which may properly be called amendments to the act to regulate commerce, such as the car-service act * * * the procedure in cases of conflict between interstate and State rates, and many other very much needed modifications of the present law. I will not comment upon the changes which have been agreed upon in such matters, for they were thoroughly discussed while the bill was on its passage through the Senate and the conference report does not depart from the Senate bill sufficiently to warrant a review." (Congressional Record, Part 4, pp. 3326-3327.)

VIEWS OF STATE AUTHORITIES ACCEPTED BY CONGRESS.

It seems to us impossible to follow the proceedings with respect to this bill, and to see what was said concerning the provisions of Section 13 (3) and (4), and the changes which were made therein, all designed to guard against the possibility of a construction which should add to the power of the Commission, and to study the reports written and spoken made from the committees with respect to the intent and purpose of the language which was finally adopted, and to entertain doubt that Congress, on this particular point, accepted the view of those who spoke for the preservation of State authority, and determined to withhold from the Commission any extension of its power over intrastate rates. By design Congress limited that

power to the correction of discriminatory situations injuriously affecting persons and localities. We submit that the Commission, having failed to obtain the extension of power, which the language it recommended would perhaps have given it, to make the order in this case and in other cases like it, should not now be permitted to read into the Act something which Congress deliberately left out.

SECTION 15-a.

The legislative history of Section 15-a may be more briefly told than that of paragraphs (3) and (4) of section 13.

There was nothing corresponding to this section in H. R. 4378.

(a) Rule of Rate Making Reported by House Committee

H. R. 10453, as reported by the House Committee, Section 417, contained a rule of rate making as follows:

> "The Commission shall be charged with the duty and responsibility of observing and keeping informed as to the transportation needs and the transportation facilities and service of the country, and as to the operating revenues necessary to the adequacy and efficiency of such transportation facilities and service. In reaching its conclusions as to the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice, the Commission shall take into consideration the interest of the public, the shippers, the reasonable cost of maintenance and operation (including the wages of labor, depreciation, and

taxes), and a fair return upon the value of the property used or held for the service of transportation. (Report No. 456, p. 20.)

This rule of rate making, however, was struck out before the bill passed the House.

(b) Rule of Rate Making in Senate Bill.

The origin of Section 15-A is evidently to be found in S. 2906. When that bill was introduced into the Senate, Section 6 and Section 25, so far as material to be here reproduced, were as follows:

"Sec. 6. In dividing the country into districts and the carriers into rate-making groups the Commission shall have in view the similarity of transportation and traffic conditions therein. Rates of transportation shall at all times be just and reasonable. In changing or modifying them from time to time in the manner provided in the Act to regulate commerce, as amended, and in viewing them from the standpoint of their effect in producing revenue in any rate-making group as a whole, the Commission shall take into consideration the interest of the public, the shippers, the wages of labor, the cost of maintenance and operation (including taxes), a fair return upon the value of the property in the group and used for or held for the service of transportation, the requirements for additional capital in order to enable the carriers to adequately perform their duties to the public and the conditions under which the same can be secured; and, for the purposes aforesaid, the Commission shall from time to time determine the value of the property in each district and so lower or advance the rates of transportation, as nearly as may be, to provide said fair return as herein provided.

"If any carrier shall receive from operation in any year, more than a fair return, to be determined by the Commission, upon the value of its property, held or used for service in transportation, which may include a just allowance to provide reasonably for future years in which there may be insufficient earnings; the excess above such fair return shall be paid to the Board within the first four months of the succeeding year, to be invested or expended for the following purposes, namely: One-half of all such payments to the Board shall be invested or expended for the purposes set forth in section 25 hereof, and one-half thereof shall be deposited in a fund which, from time to time, shall be expended by the Board in the purchase of equipment to be leased under proper terms to carriers in order to facilitate transportation, or, to loan to carriers upon reasonable security in order to purchase equipment or other facilities in the event that such carriers are unable to secure elsewhere the funds with which to provide themselves with adequate transportation facilities. In no event shall surplus earnings in excess of the amount sufficient to pay a fair dividend, whether represented in reserves or otherwise invested in the property of the carrier, be capitalized or used in any way as a basis for increased rates.

"In applying the foregoing rule a comprehensive view of the rate-making group shall be taken and the level of rates, fares, and charges shall be determined with reasonable reference to average conditions therein."

"Sec. 25. The share of excess earnings assignable for the benefit of employees as hereinbefore provided shall be put into a fund designated as the employees' welfare fund, under the control and administration of the board. Said fund * * *"

As the bill passed the Senate, the plan was contained in Section 6, which, so far as material to be reproduced, was as follows:

> "Sec. 6. In dividing the country into districts and the carriers into rate-making groups the Commission shall have in view the similarity of transportation and traffic conditions therein. Rates of transportation shall at all times be just and reasonable and sufficient to produce a reasonable return upon the aggregate value of the property in each rate group used or held for service of transportation.
>
> "It being impracticable to establish a level of uniform rates and charges within competitive areas which will sustain sundry carriers indispensable to the communities served by them, without enabling more favorably situated carriers to receive revenue from such rates, negligibly as to each service but in the aggregate substantially and unreasonably in excess of the aggregate over a fair return upon their property, unless regulated in the interest of the commerce of the United States as a whole, it is hereby provided that, subject to the exceptions and conditions of this Act, no carrier subject to the provisions of this Act shall be authorized to receive and retain for the transportation services rendered such proportion of the rates and charges collected by it as may yield in the aggregate more than a reasonable return upon the value of its property held for and used in the service of transportation, determined as herein provided. In changing or modifying rates, fares, charges, and classifications from time to time in the manner provided in the Act to regulate commerce, as amended, and in viewing them from the standpoint of their effect in producing revenue in any rate-making group as a whole, the Commission shall initiate, modify, or adjust rates, fares,

charges, and classifications, as nearly as may be, so that the railway carriers as a whole allocated to each district and subject to this Act shall earn an aggregate annual net railway operating income equal, as nearly as may be, to 5½ per centum upon the aggregate value, as determined in accordance with the provisions hereof, of the railway property of such carriers in the district held for and used in the service of transportation: Provided, That in this respect the Commission shall have reasonable latitude in order to adjust any particular rate, fare, or charge which may be found unreasonably high or unreasonably low. And it may, in its discretion, add to the basis above mentioned one-half of 1 per centum upon the aggregate value of said property, to make provision, in whole or in part, as the case may be, for what are commonly known as nonproductive improvements, betterments, or equipment, which, according to the custom heretofore prevailing, have been charged to capital account, but which, to the extent that such allowance for such purpose shall be reflected in the net operating income of the several carriers, to be determined by the Commission, shall not be capitalized or used in any way as a basis for increased rates, fares, or charges by those carriers whose net operating income for the year exceeds 5½ per centum upon the value of their respective properties.

"In so changing or modifying rates, fares, charges, and classifications from time to time in the manner provided in the Act to regulate commerce, as amended, the Commission shall take into consideration the interests of the public, the shippers, the wages of labor, the cost of maintenance and operation, including taxes, the requirements for additional capital in order to enable the carriers to adequately perform their duties to the public, and the conditions under which the same

can be secured, and shall, so far as practicable, adjust rates, fares, charges, and classifications that the net operating income of the several carriers shall bear the same relation to the value of their respective properties. For the purpose aforesaid, the Commission shall from time to time determine the value of the property in each district and rate-making group so held for and used in the service of transportation, and lower or advance the rates, fares, or charges for transportation to produce, as nearly as may be, the net operating income above mentioned.

"If, under the above provisions, any carrier shall receive a net railway operating income in any year of more than 6 per centum, after allowances, as aforesaid, by the Commission for non-productive improvements, upon the said value of its property, one-half of such excess between 6 and 7 per centum shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half of such excess between 6 and 7 per centum shall, within the first four months of the succeeding year, be paid to and recoverable by the Board for the purpose of establishing and maintaining a general railroad contingent fund, as hereinafter described." (P. 98, H. R. 10453.)

(c) *Discussion of Rule of Rate Making in Conference Committee Report.*

The Transportation Act, as reported by the Conference Committee, section 422, contains section 415-a as it now stands.

The report of the committee touching this section made no reference to intrastate rates. It was in full as follows, being found on page 67 of the report:

"RULE OF RATE MAKING.

[Sec. 422 of the conference bill.]

The House bill continued the existing law authorizing the Interstate Commerce Commission to prescribe just and reasonable rates. Section 6 of the Senate amendment added to the just and reasonable rule a requirement that the rates must be adequate to enable the carriers as a whole to earn a fair return on the aggregate value of their property, and provided that if from such rates any carrier's railway operating income exceeded 6 per cent of the value of its railway property, a portion of the excess should be turned over to the Government and placed in a railroad contingent fund, to be used for the purpose of making loans to or providing equipment for railroad carriers generally. The House receded from its disagreement to these provisions of section 6, and agreed to them as revised by the conferees in section 422 of the conference report. This section directs the Commission to make rates adequate to provide the carriers as a whole (either in the entire country, or in rate groups or territories to be established by the Commission) with an aggregate annual net railway operating income equal as nearly as may be to a fair return on the aggregate value of the railway property held for and used in the service of transportation. The Senate bill required the establishment of rate districts, but the conference bill leaves their establishment to the discretion of the Commission. The Commission is authorized to determine the value of railway property, and is specifically directed in this connection not to give undue consideration to the property investment accounts.

The Commission is also authorized from time to time to determine and publish what percentage constitutes a fair return on railway property, except that for the two years beginning March 1, 1920, it is declared in this section that 5½ per cent of the aggregate value of the railway property shall constitute

a fair return, unless the commission in its discretion adds thereto, in whole or in part, one-half of 1 per cent of such value to make provision for improvements and betterments chargeable to capital account. The result of these provisions is that 5½ per cent is fixed as a minimum and 6 per cent as a maximum during the next two years, and thereafter the matter is left to the discretion of the Commission.

Section 6 of the Senate bill provided that one-half of any excess income between 6 and 7 per cent should be paid into the carrier's reserve fund and the other one-half into the contingent fund, and that the excess of such income above 7 per cent should be payable one-fourth to the carrier's reserve fund and three-fourths to the contingent fund.

The conference bill provides that if any carrier earns in any year a net railway operating income in excess of 6 per cent of the value of its railway property, one-half of such excess must be placed in a reserve fund until such fund equals 5 per cent of the value of the carrier's property, and thereafter may be used for any lawful purpose by the carrier. The other one-half of such excess income must be paid into a general railroad contingent fund to be administered by the Commission. The conference bill adds a provision that the value and the income of a group of carriers which are under common control and management and are operated as a single system shall be computed for the system as a whole.

The general railroad contingent fund is to be used to make loans to carriers to meet expenditures for capital account or to purchase equipment to be leased to the carriers. The making of such loans and the obtaining and leasing of such equipment are left to the Commission."

THE COMMISSION'S CONSTRUCTION OF AMENDMENTS RELIED ON.

We may now discuss the construction by the Commission and by the Court below of the amendments relied on.

We have seen that they have attributed to Section 15-a an intent to require the Commission to fix the aggregate value of all the roads in each group designated by it, and then to prescribe rates which will yield the fixed percentage return contemplated by that section, and that there has been attributed to paragraph 4 of Section 13 an intent to authorize the Commission to find any intrastate rate discriminatory which does not conform to the level of intrastate rates fixed by the Commission.

The discrimination found in this case is not of the character described in *Houston & Texas Ry. vs. U. S.*, 234 U. S., 342, 353. In stating the power of Congress in that case the Court said:

> "We find no reason to doubt that Congress is entitled to *keep the highways of interstate commerce open to interstate traffic* upon free and equal terms. That an unjust discrimination in the rates of a common carrier, by which *one person or locality is unduly favored as against another* under substantially similar conditions of traffic, constitutes an evil is undeniable; and when this evil consists in the action of an interstate carrier in *unreasonably discriminating against interstate traffic* over its line, the authority of Congress to prevent it is equally clear. * * * (355) Congress is entitled to maintain its own standard as

to these rates, and to forbid *any discriminatory action* by interstate carriers *which will obstruct the freedom of movement of interstate traffic* over their lines in accordance with the terms it establishes."

The Court then quoted Section 3 and said:

"(356) It is apparent from the legislative history of the Act that the evil of *discrimination* was the principal thing aimed at, and there is no basis for the contention that "Congress intended to exempt any discriminatory action or practice affecting interstate commerce which it had authority to reach."

In *American Express Company v. Caldwell*, 244 U. S., 417, the Court said:

"Where * * * there is a conflict between the Federal and the state authorities the Commission's order can not serve as a justification for disregarding a regulation or order issued under state authority unless and except so far as it is *definite as to the territory or points to which it applies*, for the *power of the Commission is dominant only to the extent* that the exercise is found by it *to be necessary to remove the* existing discrimination against interstate traffic."

If the only acts of regulation by a state which the Federal Government may interfere with, under the commerce clause, are those which obstruct the free movement of traffic in the channels of interstate commerce, then Section 15-a would be ineffective even if to be construed as the Commission has construed it. We maintain, however, that Section 15-a has no relation to intrastate rates. If that be true, no duty which it lays upon the Commission can authorize the Com-

mission to find to be discriminatory rates which could not be so found under other portions of the Act.

Section 15-a commands the Commission to exercise "*its power to prescribe just and reasonable rates,*" so that carriers shall earn a return "*as nearly as may be,*" which means as nearly as the Commission can by its order provide, upon the aggregate value of carrier property. If it be admitted that Congress had in mind total net railway operating income earned from all traffic, state as well as interstate, and total aggregate value of property devoted to all traffic, it did not expect the Commission to exercise control over the income from the intrastate traffic, for it had expressly withheld the intrastate traffic from the Commission's control. This it did by the proviso in Section 1 excluding intrastate commerce from the purview of the Act. Also in Section 15, where the power of the Commission to "prescribe what will be * * * just and reasonable rates," the power of the Commission is limited to rates for transportation, "as defined in the first section of this Act." *The transportation defined in Section 1, 1 (a), (b) and (c) is interstate transportation only.*

We maintain that Congress intended only to command the Commission, in adjusting rates, to do what it could to enable carriers to earn the income prescribed, acting "in the exercise of its power" to regulate *interstate* rates. If rates prescribed by state authority shall chance to be too low, and because of that fact the net railway operating income shall fall short of producing a fair return on the aggregate value of all carrier property, it will still be "as nearly as may be" to that return, by reason of anything that the Commission may do "in the exercise of *its* power to prescribe just and reasonable rates."

But the Commission said in its report in the Illinois case, referred to for the reasoning of this case:

> "If, without good reason, the fares within a state are lower than those authorized and established for interstate application, intrastate passenger traffic will not contribute its just share to the passenger revenues of the carriers, and the carriers may not earn the statutory return without *further increases in the transportation charges on other traffic, including interstate commerce, thus unjustly discriminating against such commerce.*" (Record, page 40.)

The conception of the law shown by this quotation appears also to have been entertained by the lower court, from the opinion of which the following is quoted:

> "We must assume that the calculations of the Interstate Commerce Commission have been based upon the cost of carrying the passengers, and if a rate if made on a basis of passenger per mile and the intrastate passenger paying a lesser rate, it is casting the direct burden upon interstate commerce and is jeopardizing the power of the national carriers to maintain themselves on the basis which Congress declared they are entitled to maintain." (Record, p. 14.)

The Commission's argument has no force unless said Section 15-a does in fact require the imposition by the Commission upon interstate traffic of sufficient rates to bring the yield from such traffic, plus the yield from intrastate traffic, to the amount of the fixed percentage aimed at.

The command imposed upon the Commission is that

it shall establish rates which will yield the indicated return "as nearly as may be," in the exercise of *its power to fix reasonable rates.*

If the Commission has fixed reasonable interstate rates, and, because of a failure on the part of states to establish reasonable rates for intrastate traffic, there is a failure of total revenue sufficient to supply the indicated return, the interstate rates fixed by the Commission can not be increased to secure that return, for they would thereupon become unreasonable rates. Such rates can not be fixed in the exercise of power "to prescribe just and reasonable rates."

Furthermore, the imposition of rates admittedly unreasonable upon interstate traffic, to make up a deficiency in revenue from intrastate traffic, would be taking the property of interstate shippers without due process of law. Such shippers are entitled to reasonable rates fixed upon consideration of the value of the property devoted to the transportation service they receive, without regard to intrastate traffic and returns therefrom. *Smyth v. Ames,* 169 U. S., 466; *Minnesota Rate Cases,* 230 U. S. 352; *Northern Pacific Railway v. North Dakota,* 236 U. S. 585, 598.

In the last case it was said:

> *"Certainly it could not be said that the carrier may be required to charge excessive rates to some, in order that others might be served at a rate unreasonably low. That would be but arbitrary action."*

Since the imposition of rates upon interstate traffic in excess of those found reasonable by the Commission would be unconstitutional, it is not to be supposed that Congress intended that such action should follow as a

consequence of the command which it imposed upon the Commission in Section 15-a, and hence no burden upon interstate commerce can result in consequence of that section by reason of the fact that intrastate rates are on a lower level than interstate.

Citation of authorities is not necessary to sustain the elementary proposition that where two constructions of a legislative provision are possible, one of which is constitutional and the other not, that construction will be adopted which preserves the constitutionality of the provision.

INTERSTATE AND INTRASTATE COMMERCE CAN NOT BE ARBITRARILY LINKED TOGETHER.

The rights of the Federal and state governments, respectively, under the Federal Constitution, are of such a nature that interstate and intrastate commerce can not be arbitrarily linked together, either by the Federal Government or by a state, for the purpose, or with the effect, of thereby placing control of either class of commerce in a sovereignty which would not otherwise enjoy the same. The power of Congress is dominant over intrastate commerce only to the extent that its exercise is necessary to protect interstate commerce. This proposition is established by cases heretofore cited.

The entire separateness of state and interstate traffic, and the incompatibility with constitutional limitations of power involved in an attempt to make the level of the rates applicable to one dependent upon the level of rates applicable to the other, strikingly appears from the opinion of this Court in *Louisville and Nashville Railroad Co. v. Eubank*, 184 U. S., 27. The effect

of this decision was stated in the *Minnesota Rate Cases* opinion, 230 U. S., 352, 429:

> "In the Eubank Case, which had been argued before the first case was decided, it appeared that the state court had construed the same provision of the Kentucky constitution as embracing a long haul from a place outside to one within the state (Nashville and Louisville) and a shorter haul on the same line and in the same direction between points within the state. The court held that, so construed, the provision was invalid as being a regulation of interstate commerce *because it linked the interstate rate to the rate for the shorter haul and thus the interstate charge was directly controlled by the state law.*"

While in the cited case the constitutional limitation involved was that placed by the Commerce clause upon the legislative power of the states, yet it would seem that the right of a state, under the Tenth Amendment, must in like manner be preserved against encroachment through the linking of intrastate and interstate commerce together, whereby intrastate commerce is "*directly controlled*" by the Federal Government.

COMMISSION'S CONSTRUCTION TAKES PROPERTY OF INTRASTATE SHIPPERS WITHOUT DUE PROCESS.

Not only does Section 15-a as construed by the Commission violate the Tenth Amendment to the Federal Constitution, but it violates the Fifth Amendment as well, by taking the property of those engaged in intrastate traffic without due process and without compensation.

As construed, 15-a determines the reasonableness of rates by an arbitrary rule of return to carriers, disregarding the value of the service rendered. Leaving to one side, for the purpose of this argument, interstate traffic, we say that this imposes rates upon intrastate shippers which they may not be constitutionally required to pay.

The general rule is found stated in *Beale & Wyman, Railroad* Rates, Vol. 2, Section 442, as follows:

> "Thus no public service company whatever its necessities, can charge the public more than reasonable rates; while if it is making exorbitant dividends it is not open to it to urge that its rates are not above the ordinary. Reasonable compensation for the services actually rendered is all that a common carrier is permitted to exact.
>
> "While it is true that a carrier has the right to exact a fair return for the public utilities it affords, the public is entitled to exact that no more be required of it for the use of such utilities than the services rendered are reasonably worth and where there is a plain and irreconcilable conflict between the interest of the public and the interest of the carrier the former must prevail." *Mitchie on Carriers, Section* 3677.

In *Covington Turnpike Co. v. Sandford,* 164 U. S., 578, 596, this court said:

> "It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or inter-

> ests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends."

The rule indicating the respective rights of carriers and the public was expressed in *Smyth v. Ames*, 169 U. S. 466:

> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

The application of Section 15-a to intrastate shippers may be considered under two heads.

THE EFFECT OF SECTION 15-a AS TO RATES UPON ROADS THAT CAN NOT EARN A FAIR RETURN.

The rule of Section 15-a is arbitrary in its operation as to traffic upon roads which, through lack of traffic, are unable to earn a fair return at reasonable rates.

The Commission is commanded, under the rule as construed, to establish rates which shall yield a fixed percentage return. The level of rates that will produce this return is thus by legislative mandate declared reasonable, without respect to the worth of the transportation service rendered, or to the effect of the rate on traffic. Under this rule, in times of business depression, when prices fall and the volume of transportation decreases, rates must be advanced without regard to the worth of the service rendered. The Commission may exercise discretion in distributing the burden among rate payers, but from such traffic as does move it must see to it that the fixed percentage return is earned.

To the extent that rates are thus exacted which are exorbitant, and beyond the fair value of the service rendered, the property of those on whom the rates are imposed is taken without compensation or due process of law.

Effect of Section 15-a on Roads Which Can Earn an Unreasonable Return if Permitted.

The Act contemplates and authorizes the consideration of roads by groups in the fixing of rates by the Commission. The Commission is commanded to divide the country into rate districts or groups, or to consider the entire country as one district, and to find the aggregate value of all the roads in each group or district and to base returns on such aggregate value. An inevitable result follows this plan. It was foreseen by Congress.

Paragraph 5 recites in substance that the plan will enable "some of such carriers to receive a net railway

operating income *substantially and unreasonably in excess of a fair return* upon a value of their railway property held for and used in the service of transportation." Later paragraphs of the section provide that the excess above a fair return so collected by a road shall be divided equally between the road and the Government.

This rule operates to impose upon the internal traffic of a state, moving upon the lines of such carriers as earn excessive returns, the payment of charges which, as to such traffic, is unreasonable in excess of fair payment for the transportation service rendered.

The case presents this outstanding question: Where a state has by law prescribed rates upon certain railroads which permit those railroads to earn a fair return, can the Federal Government, under the Constitution, set aside those rates, and prescribe other and higher rates, and devote the proceeds of the increases in part to building up reserve funds for the receiving carriers, and in part to building up a contingent fund to be taken and used by the Government in fostering interstate commerce?

The authorities we have heretofore cited are to the effect that the internal commerce of a state is reserved for the control of that state, which has the same right to prescribe rates for the transportation of the same as the Federal Government has to prescribe rates for interstate commerce, subject only to the limitation that it may not prescribe rates which, in their operation, operate to injure interstate commerce.

If it be admitted, for the purpose of this argument on this particular point, that non-compensatory rates upon intrastate traffic may weaken interstate carriers, and so retard or otherwise injure interstate commerce that the Federal Government may require the same to

be increased, this does not reach the situation under discussion. *Power to raise rates that are non-compensatory is a very different thing from power to raise rates that already yield a fair return on the value of the property used, to a point where they will yield "substantially and unreasonably in excess of a fair return on such value."*

The Federal power with respect to intrastate rates is dominant only to the extent that its exercise is necessary to protect interstate commerce from injury. When the returns yielded by rates in effect are adequate there can be no weakening of carriers, nor injury to interstate commerce from failure to increase them, and hence the Federal power never becomes dominant as to such rates.

The right to receive transportation upon the payment of just and reasonable charges is a property right, and any statute which imposes transportation charges which are "substantially and unreasonably in excess of a fair return upon the value" of property devoted to the purpose of such transportation, operates to take property without due process of law.

Opinion of Former Justice Hughes.

This point was discussed by former Justice Hughes in an opinion filed with the House committee during the hearings on H. R. 4378. It appears that the Committee then had before it the plan contained in S. 2906, in its original form, set out at page 103 of this brief. It was the proposal of that plan to distribute earnings of carriers in excess of a fair return, which some carriers were to be permitted to earn under that plan in the same manner as under section 15-a, partly to carriers that earned less than a fair return, and partly to a fund to be used for the benefit of railway employees. So far

as rates imposed on shippers were concerned, the plan under discussion in the memorandum was the same as now in section 15-a.

Concerning the constitutionality of such plan, from the point of view of shippers and passengers over lines to be permitted to earn an unreasonable return, the opinion was in part as follows:

> "Assuming that it is the intent of the provision that the rates producing the 'excess' earnings in the case of a particular carrier are to be deemed to be unreasonable as to that carrier, there is manifestly a question beyond that of the right of that carrier to complain. * * * Manifestly, in such case, the question of the validity of such a provision in the exercise of the regulating power is not exhausted by the mere consideration of what amounts to confiscation of the carrier's property. Unreasonable rates constitute an unjust exaction from shippers or passengers. The rates maintained by Congress, or under its authority, in the exercise of its power of regulation of interstate commerce, are lawful because deemed to be reasonable, a presumption which the courts entertain, so long as the rates lie within the range of legislative discretion. But if we proceed on the assumption that the rates which are actually charged are extortionate, it would appear to be an abuse of the regulating power of Congress to enforce them. Congress, it may be said, could not, under the guise of regulating interstate commerce, compel shippers or passengers to pay confessedly extortionate charges for the services rendered. On the hypothesis that the charges are unreasonable, the power to authorize them, no less than the power to collect them, falls. The exaction and maintenance of such charges would deprive shippers and passengers of their property without due process of law." (House Hearings, page 2985.)

Real Purpose of Section 15-a.

Laying aside for the moment the question of constitutionality of section 15-a, it may be pointed out that the construction which the Commission has placed upon it goes far beyond the design of Congress, as evidenced by the language contained in the section, and by the proceedings in Congress which lead to its enactment.

Congress was not seeking to establish uniform rates upon all traffic. It was, so far as interstate rates were concerned, seeking to establish as the basis for determining the sufficiency of such rates, group values instead of values of particular properties. (See statements touching this point made before committee at page 60 of this brief.)

It is common knowledge that one embarrassment attending carriers' efforts to increase rates had been that the most advantageously located lines could not show a need for increased earnings. If the Commission did not increase the rates of such lines, however, it was useless to increase the rates on competing lines, even though such competing lines did need increased earnings, for that would divert traffic to the roads which continued with rates at the former level, and the situation of the poorer roads would be, so far as competitive traffic was concerned, made worse than it was before.

The purpose of section 15-a was to carry rates on all roads to a higher level, so that thereby roads deemed by Congress "indispensable to the communities to which they render the service of transportation" might be sustained. That this was the purpose of the section seems plain from the form in which the provision first appeared, and from the form in which it now stands.

Paragraph 5 of said section does not contemplate "uniform rates" upon *all traffic*, but "uniform rates upon *competitive* traffic." There may be ground for argument that it is good policy for the Federal Government upon competitive traffic to allow some roads to earn more than a fair return, so that weak competing roads may be sustained. But the competitive traffic is ordinarily through traffic, which passes state lines, and is so subject to Federal regulation. Intrastate traffic, on the other hand, in very large part, is not competitive, being often confined to a single route.

If such traffic passes over lines that are already prosperous, and at the rates fixed by state authority yields abundant return upon the value of the property devoted to the transportation of it, it is impossible to perceive any advantage that would be derived to the people of the state, or of the United States as a whole, from forcing advances in the rates upon such traffic. Yet the construction placed by the Commission on section 15-a operates to advance such rates equally with rates on competitive traffic. We confidently urge that this is a clear misconstruction. A little later we shall discuss this misconstruction further, and show that it produced the order complained of in this case, and that hence the order should be held invalid, regardless of any question of constitutionality of section 15-a properly construed.

Right of a State to Determine Its Own Public Policy.

We maintain, however, firmly that the public policy which shall control in the regulation of carriers, so far as such carriers are engaged in the transportation of intrastate commerce, must be determined by the state

and not by the Federal Government. If it be granted, for the sake of argument at this point, that a failure to permit reasonable returns upon the intrastate business of an interstate carrier may be found to constitute unjust discrimination, such discrimination can be found only when the return upon the value of the property devoted to such transportation *is in fact unreasonable.*

If it is claimed to be good public policy to go beyond what is reasonable in some cases, it is the constitutional right of a state to determine that question for itself. Its determination may be unwise, but it alone has the right to make it. What this court said in *Erie Railroad* v. *Public Utilities Commission,* decided January 3, 1921, relating to the constitutional right of a state to require that the operations of carriers within its borders shall be conducted with safety to its inhabitants, the Commission having required an impecunious carrier to abolish fifteen grade crossings in the city of Paterson, may well be quoted here:

> "That the states might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. * * * If the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce. * * * Intelligent self interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty. * * *
>
> "* * * Upon the whole matter while it is dif-

ficult to avoid the apprehension that the state officials hardly gave due weight to the situation of the company as a whole in their anxiety for the well being of the state, we are of opinion that they did not exceed their constitutional powers. The order should be regarded as stating a condition that must be complied with if the company continues to use the New Jersey soil."

THE COMMISSION'S MISCONSTRUCTION OF THE EFFECT OF SECTION 15-a AS TO UNIFORMITY OF RATES PRODUCED THE ORDER COMPLAINED OF.

The Commission's misconstruction of the true purpose of section 15-a as to uniformity of rates produced the order complained of in this case. We have before called attention to the entire failure of the Commission to make definite the persons and localities, if any, injured by the intrastate rates sought to be displaced by its order. If the Commission found all intrastate passenger fares in Wisconsin in fact discriminatory it would undoubtedly, in view of the decision of this court in *Illinois Central Railroad* v. *Public Utilities Commission*, 245 U. S., 493, before cited, have clearly stated that finding, as it might easily have done. Instead, however, it has expressly left open the question of what rates are discriminatory and what rates are not discriminatory. This will be seen upon an examination of what the Commission did say. To make such examination of the Commission's utterances in their entirety it is necessary, as has already been pointed out, to go beyond the Wisconsin report. Doubtless for the purpose of most expeditiously exercising the new power which the Commission believes has been committed to it, it has applied Mr. Ford's methods, and has standardized its

reports. Having stated its conception of the law, and its methods of procedure, in the New York and Illinois reports, which are part of the record here, it has since contented itself by reference to those reports, making its findings as to discriminations found in all the cases relating to the same class of traffic in the same form, and leaving the earlier reports to be examined for statements of reasons and of procedure.

In the Wisconsin case the Commission referred to the New York case. There it said:

> "There may be cases in which intrastate rates affect interstate commerce injuriously in ways so manifest as to make them subject to our control. There may be cases in which the connection of intrastate rates with the movement of interstate commerce is so remote and unimportant that we may properly disregard it. But in every case which puts in question intrastate rates, the decisive factor is whether or not they affect interstate commerce injuriously to a considerable extent. If they do, they are brought under our jurisdiction and made subject to our control, even although the whole rate structure of a state should be involved." (Record, p. 97.)

Having started out thus in stating the law generally, the Commission proceeded after a little to the consideration of its duty under section 15-a, saying:

> "Congress has taken, as the basis for determining a fair return for the railroads, the aggregate value of the railway properties in each group * * * (and) has directed that we allow rates that will yield in the aggregate a return of 5½ or 6 per cent upon the value of the railway property in each of the groups." (Record, p. 98.)

Findings similar to those made in this case were then made in that case. The Commission said:

> "This proceeding presents a practical question which we have endeavored to deal with in a practical way. *The needs of these interstate carriers for revenue* to enable them to provide adequate transportation service and facilities are *immediate* and, in the interest of the public, *can not be permitted to await the consideration in detail of individual fares, charges, and rates.* The record shows that the respondent carriers perform the services here in question under substantially similar circumstances and conditions, whether in respect of interstate or intrastate transportation; and that the lower basis of intrastate fares, charges, and rates results in undue prejudice against interstate passengers and shippers and unjust discrimination against interstate commerce. The present record warrants the findings hereinafter made. *Those findings are without* prejudice to the right of the authorities of the State of New York *or of any other interested party, to apply in the proper manner for a modification of our findings and order as to any fares, charges, or rates on the ground that the latter are not related to the interstate fares, charges, or rates in such a way as to contravene the provisions of the interstate commerce act.*" (Record, p. 99.)

Thus the Commission on its own statement has not considered the particular rates which it has ordered advanced, but has included all rates in its order, without knowing whether they should all be advanced or not. This it attempts to excuse upon the ground of lack of time, and rather graciously permits the state to come before it and prove what rates ought not to have been advanced.

We maintain that this is a clear violation of the Act.

Before the Federal Government can set aside intrastate rates upon the ground that they injure interstate commerce, it must be found as a fact that they do produce such injury. This the Act recognizes, and it confines the Commission's jurisdiction accordingly, by limiting it in the grant in section 13 (4), as follows:

> "Whenever * * * the Commission, after full hearing, finds that *any* such *rate, fare, charge, classification, regulation,* or *practice* causes any *undue or unreasonable advantage,* preference, or prejudice * * * it shall prescribe, etc."

The use of the singular here indicates that the Commission is to make the *finding* as to *each rate* covered by its order. Constitutional rights are not to be destroyed, or even suspended, upon suspicion. They can in fact never be either destroyed or suspended, or disregarded. No rate applicable to traffic intrastate, prescribed by state authority, can be set aside until it be ascertained, by the appropriate tribunal, with all reasonable certainty, that in making it the state has *acted outside its constitutional rights,* and has injured that commerce which the constitution commits to the Federal Government for protection, or has confiscated property protected by the Constitution. The *Minnesota Rate Cases,* 230 U. S., 352.

This admission, made in the New York case, and incorporated by reference thereto in the report in this case, as well as in other state cases, that the Commission regarded carriers' needs for revenue as too imperative to permit the finding to be made, and that hence it advanced all rates, leaving the state to seek a modification of the order as to rates not in fact discriminatory, renders the order invalid.

THE COMMISSION'S DECISION IN THE TEXAS CASE.

On the date that this portion of this brief goes to press, February 25th, 1921, the Commission has handed down its report and order, dated February 12th, 1921, *In the Matter of Intrastate Rates Within the State of Texas*. This order in terms advances all intrastate freight rates and all passenger fares, including sleeping car and parlor car charges, within the State of Texas (the same exception as to commutation fares, multiple forms of tickets, extra fares on limited trains, and club car charges being made as has thus far been made in like cases) to a level above that permitted by the laws of Texas.

It appears that evidence was offered on behalf of the State of Texas, in the form of exhibits, showing the value of railroad properties in Texas, it being claimed by the state that the rates and fares prescribed by the state yielded a fair return upon the value of the property devoted to the traffic to which such rates and fares were applicable. This contention the Commission disposed of as follows:

> "We deem it unnecessary for the purposes of this report to enter upon a discussion of the testimony and exhibits dealing with the valuations of railroad properties in Texas and the earnings of the carriers on state traffic. In a proceeding similar to this, *Increased Rates within Illinois*, 59 I. C. C., 350, it was urged that in prescribing the measure of the increases to be applied to the rates and charges of the carriers throughout the country necessary to yield the return fixed by Congress for the two years beginning March 1, 1920, we had failed to determine the values of the railroad property separately in that and other states. We

pointed out therein that Congress had laid upon us the duty of prescribing rates so that in the aggregate they would yield a certain return, as nearly as may be, 'upon the aggregate value of the railroad property of such carriers held for and used in the service of transportation,' and expressed the view that the interstate commerce act required us to determine upon a valuation for the total property of the carriers and not for the property that might be assigned to interstate traffic. We adhere to that view and repeat that, in our opinion, the manifest intent of Congress was to repose in us full and final authority to provide the revenues found necessary to yield the specified return by considering the entire structure of rates, both state and interstate, and the aggregate value of the railroad property held for and used in the service of transportation without regard to state lines, and to protect interstate commerce against any rate, fare, charge, classification, regulation, or practice that causes any undue, unreasonable, or unjust discrimination."

COMMISSION'S COMMENT ON SECTION 13 (3) AND (4) IN ILLINOIS CASE.

The Commission in the Illinois case said:

> "Legislatures do not enact laws for the purpose of construing a previous act unless a construction has been placed upon the prior act which was not intended by the legislature. There is certainly nothing in paragraph 4 of section 13 which indicates any purpose of construing section 3 of the act." (Record, p. 37.)

The Commission would appear from this to make the deduction that Congress must therefore have intended to extend the Commission's power over intrastate rates generally. But this disregards the other important

purposes which we have heretofore pointed out as accomplished by section 13 (3) and (4), which were, (a) the making of requirement for notice to state authorities, and giving them right to participation in proceedings; (b) also express provision for joint conferences and joint hearings with such state authorities, (c) the granting to the Commission of power to fix rates to take the place of rates found discriminatory, and (d) the granting of right of petition against such rates to carriers.

The statement here quoted from the Commission's report in the Illinois case is in striking opposition to the utterance of Commissioner Clark before the House Committee, already once quoted, as follows (House Hearings, p. 110):

> "MR. SANDERS of Indiana. Section 13 of this act, which proposes to amend section 13 of the original act, deals with that question of additional power which section 13 gives the Interstate Commerce Commission.
>
> "MR. CLARK. I do not think that it gives us any more power under the law. *I do not think it expands* or contracts the application of the terms of the law *or the Commission's power thereunder,* but it does *define a relationship and outline a procedure* that we hope will operate to minimize the number of instances in which undue prejudice will persist, and to simplify the removal of it where it may be found to exist."

EVEN IF SECTION 15-a IS APPLICABLE TO INTRASTATE RATES, THE COMMISSION MUST BASE ITS FINDING OF DISCRIMINATION UPON THE RETURN FROM INTRASTATE TRAFFIC ON THE VALUE OF PROPERTY DEVOTED THERETO.

Regardless of questions of constitutional power, the Commission can go no farther in the regulation of intrastate rates than it has been authorized to go by the statute under which it acts.

No claim is made that the Commission may act in the regulation of intrastate rates otherwise than is provided in section 13. The claim is that by reason of the command which is laid upon the Commission in section 15-a it may find intrastate rates discriminatory which could not be so found if section 15-a were not in the Act. The phrase "discrimination against interstate or foreign commerce" is to be construed in the light of section 15-a, according to the claim, but the grant of power to prescribe intrastate rates is still found in section 13.

What, then, is the limit of the Commission's power under section 13, even if it is to be construed as authorizing the increase of intrastate rates for revenue purposes? It is not a power to increase any intrastate rates which the Commission sees fit to increase. The Commission, as we have pointed out above, may act only when "after full hearing" it "finds that any such (intrastate) rate * * * causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate and foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce."

If the Commission is to rest an order upon a finding of "discrimination against interstate or foreign commerce," by reason of the fact that the rate to be increased does not yield its fair share of revenue to support the operations of the carrier, it must find that fact. Until it is found, the right to exercise the power to displace the state rate does not come into existence. This has been hereinbefore elaborated.

The sufficiency of intrastate rates depends upon the value of the property devoted to the transportation for which the rates are fixed, and the return yielded by the rates. If they yield a fair return, they are sufficient, and can not be displaced by the Commission. Section 15-a recognizes value as the measure of reasonableness.

Determination whether intrastate rates are sufficient requires then a consideration of the value of the property devoted to the intrastate service. No valid finding can be otherwise made. The inconvenience of ascertaining such value can not remove the necessity for its ascertainment. This point has been clearly decided by this court in cases involving exactly the same principle. In *Smyth v. Ames*, 169 U. S., 466, 541, the question was involved whether rates, prescribed by state authority, were invalid, as in violation of the Fourteenth amendment, because confiscatory. The court held that, in determining the sufficiency of the rates so prescribed, *the value of the property devoted to intrastate transportation must be the measure.* Upon this point the court said:

> "In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate

business done by the carrier, or to the profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the state, can have no application where the state is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business."

The principle thus laid down was reaffirmed in *The Minnesota Rate Cases*, 230 U. S., 352, 435. The same question was involved. It was held that the state's right to prescribe intrastate rates was of such a nature that rates prescribed by the state could be disregarded as in violation of the Fourteenth Amendment, only when shown without question to be so low as not to

yield a fair return upon *the value of the property devoted to intrastate transportation.* The court said:

> "Where the business of the carrier is both interstate and intrastate, the question whether a scheme of maximum rates fixed by the state for intrastate transportation affords a fair return, must be determined *by considering separately the value of the property employed in the intrastate business and the compensation allowed in that business under the rates prescribed.* This was also ruled in the *Smyth* case (*Id.*, O. 541). The reason, as there stated, is that the state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, *the carrier can not justify unreasonably high rates on domestic business because only in that way is it able to meet losses on its interstate business.* * * *
>
> "We are of opinion that on an issue of this character involving the constitutional validity of state action, general estimates of the sort here sumitted, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation. While accounts have not been kept so as to show the relative cost of interstate and intrastate business, giving particulars of the traffic handled on through and local trains, and presenting data from which such extra cost, as there may be, of intrastate business may be suitably determined, it would appear to have been not impracticable to have had such accounts kept or *statistics prepared at least during test periods properly selected.* It may be said that this would have been a very difficult matter, but the company having assailed the constitutionality of the state acts and orders was bound to

> establish its case, and it was not entitled to rest on expressions of judgment when it had it in its power to present accurate data which would permit the court to draw the right conclusion. * * *
>
> "As neither the share of the expenses properly attributable to the intrastate business, nor the value of the property employed in it, was satisfactorily shown and hence it did not appear upon the facts proved that a fair return had been denied to the company, we are of the opinion that the complainant failed to sustain his bill."

It will be observed that the cases just cited were exactly analagous to this case. The question involved was one of constitutional limitation upon the power of a state to regulate intrastate rates. It was established by those decisions that the constitutional guaranty against confiscation in the Fourteenth Amendment *entitled the carrier* to a consideration of *the value of its property devoted to intrastate transportation*, and to a fair return upon that value, *without regard to its interstate operations and the revenue therefrom.* It was likewise determined that the reservation of power to a state, under the Tenth Amendment, *entitled a state to a like consideration of the value of property devoted to intrastate transportation in judging the sufficiency of rates prescribed by it.* In other words, the Federal Constitution was held to protect the state in the exercise of its reserved power as fully and effectively as it protected the carrier in its property right.

This case may be said to present the question whether the Constitution protects from destruction by the Federal Government those rights which were reserved to the states by the Tenth Amendment as carefully as it protects the property rights of carriers un-

der the Fourteenth Amendment. That question ought never to have been raised by the action of a Federal tribunal, for there is but one answer to it.

COMMISSION'S CONSTRUCTION OF PORTIONS OF ACT RELIED ON INCONSISTENT WITH OTHER PORTIONS OF ACT.

(*a*) Section 13 (3) Safeguards and Extends State Rights.

The Commission's construction of the portions of the Act, under which it claims power, is inconsistent with other portions, which show that Congress understood that the states were to continue to regulate intrastate rates.

If Congress had intended that under Section 15-a, the Commission should prescribe not only rates formerly under its jurisdiction but intrastate rates as well, there would have been no occasion for establishing a procedure to be applicable "in any investigation (in) * * * which * * * there shall be brought in issue any rate * * * made or imposed by authority of any state," nor any occasion for providing for the holding of joint conferences and joint hearings in the case of alleged conflict between intrastate and interstate rates, as was done in Section 13 (3).

All the rates and fares in effect when the Transportation Act was passed were rates "initiated by the President during the period of Federal Control," also referred to in said paragraph 3.

In the face of these provisions, we believe it to be not open to doubt that Congress contemplated the continued exercise of rate-making power by the states. This would seem to dispose conclusively of the contention that it was the intention of Section 15-a to

empower and direct the Commission to fix all rates, both interstate and intrastate, upon a uniform basis. These provisions, it would seem, can have been incorporated in the act, which controls the Commission, for no other purpose than to safeguard the power of states, and to extend their rights.

Another provision in the Act is wholly inconsistent with any other construction than one which continues state power of regulation. This is the provision for the temporary fixation of intrastate rates.

Section 208-a of the Transportation Act Providing for Temporary Fixation of Intrastate Rates.

Section 208-a of the Transportation Act, as passed, was designed to accomplish the fixation of intrastate rates to the extent therein provided. The legislative history of this section is most significant, as indicating the understanding of Congress as to the power which the states would exercise after passage of the Act, and after the termination of Federal control.

H. R. 4378 contained no provision touching the subject-matter of Section 208-a. The necessity for a provision for fixation was shown by statements before the House Committee which have been heretofore set out, beginning at page 65 of this brief. It will be seen from these statements that there was no occasion for the provision for fixation so far as interstate rates were concerned. (See statement of Commissioner Clark, page 67 of this brief.)

Fixation of rates was first provided for in H. R. 10453, which provided as follows:

> "Existing Rates to Continue in Effect.
>
> "Sec. 206. All rates, fares, and charges, all divisions of joint rates, and all classifications, regula-

tions and practices in anywise changing, affecting, or determining any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which immediately preceding the termination of Federal control are in effect on the lines of carriers subject to the Commerce Act, shall continue in force and effect until thereafter changed by state or Federal authorities, respectively, or pursuant to authority of law."

Concerning this section the Committee Report, No. 456, made the following statement at page 12:

> "Under the terms of the bill (Sec. 206) 'all rates, fares and charges, all divisions of joint rates and all classifications, regulations and practices in anywise changing, affecting or determining any part or the aggregate of rates, fares or charges, or the value of the service rendered, which, immediately preceding the termination of Federal control, are in effect on the lines of carriers subject to this act, shall continue in force and effect until thereafter changed by or pursuant to authority of law.' Without such a provision the rates, fares, charges, etc., authorized under Federal control would terminate immediately upon the termination of Federal control and would revert to the status existing prior to time they were changed or increased by order of the President. In view of the enormous increase in operating costs of carriers due to increased wages and cost of materials, decrease in the revenues as would render it utterly impossible, even for the stronger railroads, to meet operating expenses. By the insertion of the above section the existing rates, fares, charges, etc., are to continue in force and effect until changed by or pursuant to authority of law—that is, until changed by the appropriate regulatory body."

The bill, as has already been stated, also contained a guaranty of an income equal to the standard return for six months after the termination of Federal control. The abandonment of the "undue burden" provision, which might have been held to empower the Commission to change intrastate rates for the purpose of increasing revenue therefrom, would, it was seen, certainly leave the amount of revenue which the carriers might earn subject to be affected by the action of State authorities. As the Federal treasury would be called upon, under the guaranty provision, to make good any deficit in net revenue below the rate fixed in the guaranty, it was not deemed wise to give up wholly, during the guaranty period, Federal control over any portion of the rates of carriers. Accordingly, when the Conference Committee struck out the "undue burden" provision from the House bill, it rewrote Section 206 to give the Commission a veto power as to reductions of intrastate rates during the guaranty period. Section 206 became Section 208-a in the bill reported and passed, being made to read as follows:

"Existing Rates to Continue in Effect.

"Sec. 208 (a). All rates, fares and charges, and all classifications, regulations and practices, in anywise changing, affecting or determining any part or the aggregate of rates, fares or charges or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare or charge shall be reduced, and no such classification, regulation or

practice shall be changed in such manner as to reduce any such rate, fare or charge, unless such reduction or change is approved by the Commission."

In presenting the bill to the House, the Chairman of the Committee said:

> "It is apparent that unless we put in a provision of this kind, then as soon as the Federal control is ended, all the rates made under Federal control would cease, and the rates would revert to their pre-control status,—both interstate and intrastate. It is clear to all that that would be calamitous. If the rates of the Federal railroads now existing as fixed by the Director General should suddenly be brought to a pre-control level, there would be scarcely a railroad in the United States that could begin to pay operating expenses. * * * If control ceases without this section in the bill, the rates would be dropped twenty-five per cent on freight and fifty per cent on passengers, with the consequences I have already stated." (Congressional Record, Nov. 11, 1919, page 8314.)

This express grant to the Commission of power of supervision over intrastate rates for a definite limited period shows that Congress understood that otherwise the States might prescribe such rates free from such supervision.

In that section is also found the response, to the extent that Congress determined to respond, to the carriers' request "in the public interest to regulate all the rates of an interstate carrier by one hand, and that the Federal hand." (Statement of Judge Thom, page 71 of this brief.)

There were, as before stated, a number of States having passenger fare statutes which prescribed fares

lower than those in force under Federal control. A considerable time would inevitably intervene before those statutes could be revised by the respective legislatures. This was recognized by Mr. Elmquist, and, on behalf of the states' commissions, his recommendation was that the existing rates be continued in force "for a period not beyond July 1, 1921, unless sooner changed by the state or Federal authorities having control or jurisdiction of rates, fares, charges and classifications, and that rates which have not been changed or approved on or prior to said date shall thereafter be of no force and effect and the rates in effect June 9, 1918, shall then be restored."

The Congress saw fit, however, to go farther than the State authorities recommended, and, in addition to granting the Commission a veto power over any action of such authorities towards reducing rates during the guaranty period, exercised its war power to nullify all State statutes and commission orders then existing which prescribed rates or fares, leaving the Federal-control rates as the legal rates, subject to change, so far as applicable to intrastate traffic, by State authority, restrained by the veto power of the Commission during the guaranty period, and unrestrained thereafter.

The effect of section 208-a has been judicially declared

In *Public Service Commission of New York* (2d District) v. *New York Central Railroad*, New York Court of Appeals, unreported, decided December 16, 1920, the Court said:

> "On December 28, 1917, under authority of an act of congress the the president entered into 'possession, use, control and operation' of the New York Central railroad and later fixed a rate of

fare upon that road, for all passengers, at three cents a mile. This action was not justified by any of the ordinary rules of law. It can be sustained solely as the exercise of the war powers of the United States. And these powers are not limited by these ordinary rules. They are not bounded by any specific grant of authority. They are not unlike what in the states we call the police power, but the police power raised to the highest degree. They are such powers as are essential to preserve the very life of the nation itself. When requisite to this end the liberty of the citizen—the protection of private property—the peace-time rights of the states must all yield to necessity.

"The time came when the necessity—the basis of the war power—ceased. The roads were to be returned to their owners, the states were once more to exercise their accustomed authority. Yet the process of readjustment was complex. And the power to seize the roads carried with it such reasonable power as was needed to bring about that readjustment in an orderly and equitable manner. The government had operated competing roads as part of one system. It had distributed cars as its needs required. It had increased the wages of employees. It had fixed the rates of fare both interstate and intrastate. The public good required that the normal state of affairs should be reestablished with the least possible disturbance. Congress was well within its rights, therefore, when it provided that the tariffs in force on February 29, 1920, should continue until thereafter changed by state or federal authority, respectively, or pursuant to authority of law, and in no case should be reduced before September 1, 1920, without the approval of the Interstate Commerce Commission.

"Obviously the purpose of this clause so far as the states were concerned was to maintain fares until September first and thereafter until, in view of possible new conditions, affirmative action was taken by the state authorities. The thought was

that in many instances local rates had been fixed by local commissions with a view to costs and earnings as they existed prior to 1917. Let them act if they desired to restore the old rates."

In *Michigan Central Railroad* v. *Michigan Public Utilities Commission*, District Court of the United States, Eastern District of Michigan, Denison, Killits and Tuttle, Judges, sitting, decided January 24, 1921, unreported, the Court said:

"We think the congressional right to effectuate the intent which we have found in Sec. 208 (a) is sufficiently based on the war power. The right to fix intrastate rates during federal control and as incidental to the war power is settled (*Northern Pac. Co.* v. *North Dakota*, 250 U. S., 135, 148). It is also beyond dispute—indeed, it is not denied by the Attorney General here—that the same power would extend to and cover federal regulation of state rates for a reasonable transition period (*Stewart* v. *Kahn*, 78 U. S., 493, 506), as incidental to the return of the railroads to their owners, covered by a shield which should prevent their immediate destruction; but it is claimed that the six months from March 1st to September 1st, during which the federal guaranty continued, exhausts such transitional or twilight period, and it is pointed out—as is true—that the effect of the construction which we give to this statute and of holding it valid to that extent is not merely to embarrass temporarily the state jurisdictions, but is really to abrogate the entire structure of rates, charges, etc., as made by statute or by commission, in every state of the union where such structures existed. Every such state must begin again. On the other hand, while there is, for the time being, a complete abrogation, yet this is only during the acquiescence and approval of the states. They may, so far as this question is concerned, restore

their pre-control structures at any time, by a statute or an order of ten words. * * *

"We cannot think that Congress exceeded its war powers in this particular."

Anomalous Situation Produced by Commission's Construction.

The situation which is produced by the Commission's construction should be considered. This can not better be shown than by referring to the decisions which the Commission has made in administering the Act according to that construction. The relevancy of the general situation produced by the construction urged for the Act is, we believe, not doubtful.

Congress is presumed to have intended the effect of its legislation. The proceedings upon this bill show the most thorough consideration. Results which follow from its application, properly construed, must have been foreseen by Congress. If a construction contended for produces a situation where intrastate shippers are left without a tribunal to which they can apply for relief from unjust rates,—if, on the one hand, contracts in the charters of carriers granted by legislatures, whereby carriers obtained the right to occupy the soil of sovereign states, are brought before a Federal department for abrogation, and if, on the other hand, trivial matters, inconsequential in their effect upon the general transportation situation, but of moment as touching the rights and contentment of the people of the states which have heretofore regulated those matters, are also to be brought to the Federal capital for settlement,—if, in short, an anomalous situation is produced, in which the rights of interstate shippers and passengers, and of sovereign states, are either left wholly unprotected or committed to the

hands of a Federal bureau, it will not be supposed that such construction was intended by Congress, if any other reasonable construction can be placed upon the Act.

(a) *The Destruction of State Power Is Complete.*

If the states must conform their rates and fares to the rates and fares established by the Commission for interstate traffic, it is superfluous to say that their power of regulation has been destroyed. Their disablement is even more strikingly complete than it would have been had the carrier's contention in *The Minnesota Rate Cases*, 230 U. S. 352, been sustained. It was there claimed that a state might not reduce intrastate rates below the level of interstate rates established by carriers. If this view had been sustained, the states might still have regulated such rates as were above the interstate level, and might have remedied discriminations as between intrastate rates, provided it did not require the reduction of any rate affected by its order below the interstate level. Nevertheless, concerning the carriers' claim, the court said, at page 417:

> "To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name while denying it in fact."

Under the Commission's construction of the Transportation Act, it is making state-wide orders which advance entire schedules of rates. By Section 13 (4) it is provided that such rates "shall be observed while

in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any state authority to the contrary notwithstanding."

The duration of these orders is also provided for by the Act, as amended, in Section 15 (2), which provides that they "shall continue in force until its (the Commission's) further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

It would be difficult to devise a scheme for the more complete destruction of state power of regulation than has been accomplished by this Act, if the construction claimed be its true construction.

In this connection, and remembering the express proviso re-enacted in Section 1, excepting intrastate commerce from the effect of the Act, we direct particular attention to the following utterance by this court in *The Minnesota Rate Cases*, 230 U. S. 352, 421:

> "It cannot be supposed that Congress sought to *accomplish by indirection what it expressly disclaimed*, or attempted to override the accustomed authority of the states *without the provision of a substitute*."

In view of these words, and of the complete disablement of the state to remedy the just complaints of its citizens, let us see what substitute, if any, has been provided by Congress in the Transportation Act, as the Commission construes it.

(b) *Intrastate Shippers and Passengers Are Left Without a Substitute Method for Procuring Relief from Unjust Rates.*

In the New York case the Commission said:

> "It has been urged in opposition to the application of this principle to the pending case that such incidental jurisdiction as we may possess over intrastate rates is contingent upon proof that discrimination exists affecting particular persons or localities. But inasmuch as the basis of our jurisdiction is our power to regulate interstate commerce, it follows that the decisive factor is whether the rates under consideration injuriously affect interstate commerce. It is no answer to this to say that if this conclusion be admitted it may have the effect of completely displacing state jurisdiction over state commerce. * * *
>
> This should not be construed as holding that jurisdiction over intrastate rates and fares has been taken away from the states and reposed in us. We find nothing in the law to indicate that such was the intent of Congress." (Record, pp. 96-98.)

This can mean nothing else than that the Act gives the Commission jurisdiction over intrastate rates only when they are claimed and found to be unduly injurious to interstate commerce. *But if the intrastate rates are merely unreasonably high, they do not injure interstate commerce; and if they merely create discriminatory situations as between intrastate shippers, they do not injure interstate commerce.* So far as the removal of discrimination is concerned, Section 13 (4) provides power to the Commission only as to cases of discrimination as between "intrastate commerce on the one hand and interstate or foreign commerce on the other hand."

If, then, in a state where the Commission has made a state-wide order, a passenger or shipper shall go before the rate regulatory authorities of the state with a complaint, either as to the reasonableness, or as to the discriminatory character, of intrastate rates, such authorities must say to him that they are disabled by the Federal order. If he comes to the Federal Commission with the same complaint, the Commission must say to him that it has no jurisdiction to entertain his complaint. So long as the order stands it locks up the whole body of intrastate rates, without power in any tribunal, state or Federal, to inquire into questions of reasonableness or discrimination, and to grant relief.

CARDINAL RULE FOR CONSTRUCTION OF STATUTES AFFECTING THE RESERVED POWERS OF THE STATES.

In construing the Transportation Act, to determine whether Congress intended to produce the anomalous situation here described, which follows the Commission's construction, the following cardinal rule, laid down by this Court in *Illinois Central Railroad v. Public Utilities Commission*, 245 U. S., 493, is applicable:

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution, the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. *Reid v. Colorado*, 187 U. S., 137, 148; *Cummings v. Chicago*, 188 U. S., 410, 430; *Savage v. Jones*, 225 U. S., 501; *Missouri, Kansas & Texas Ry. Co. v. Harris*, 234 U. S., 412, 419."

(c) *Decisions and Proceedings of the Commission Under the Transportation Act.*

For the purpose, before indicated, of showing the inherent unreasonableness of the construction which the Commission has placed upon the Act, we now turn to review in a summary fashion its decisions and proceedings in cases affecting state authorities under its construction of the Act. We do this expressly disclaiming the purpose of presenting any of those cases for present consideration or discussion, otherwise than as reported decisions of the Commission which may properly be discussed in considering the legal questions presented by this case.

If an examination of those decisions shall indicate that the effect of the Commission's construction is to produce a situation which it is highly improbable that Congress intended to produce, but which the Act as construed by the Commission does produce, that will be considered by the court as bearing upon the intention of the Act.

New York Fares and Charges, 59 I. C. C., 290.

In this case the Commission ordered all passenger fares in New York, except commutation fares, advanced. The state showed that passenger fares between Buffalo and Albany were limited by the charter of the New York Central. It further showed that, while passenger fares generally were limited by statute, the Public Service Commissions of the state were authorized, upon proper application and showing, to advance statutory fares.

The report of the Public Service Commission of New York (Second District) was before the Federal Commission. This showed that the Commission in

its report called attention to this fact, and practically invited the carriers to put themselves within the law. This the carriers declined to do, claiming that they were not obliged to conform to the state law, but that the report and order of the Federal Commission in *Ex Parte* 74 made it obligatory upon the State Commission to grant corresponding increases in passenger fares and freight rates.

The Commission, nevertheless, advanced all fares as stated, except commutation rates, without discussion of the effect of the charter provisions referred to, or of the failure of the carriers to apply to the local authorities, before asking the Federal Commission to act.

The state has filed a bill in the United States District Court for the Northern District of New York to set aside the order of the Commission. The prayer of the bill has been denied, appeal has been taken, and as early as the same can be perfected the State of New York will be in this court seeking to defend contract rights, obtained in consideration of charter privileges granted almost 70 years ago from abrogation at the hands of a Federal department.

ILLINOIS PASSENGER RATES, 59 I. C. C. 350.
ILLINOIS FREIGHT RATES, 60 I. C. C., 90.

In the Illinois passenger fare case the Commission made a state-wide order advancing all intrastate passenger rates, except commutation rates and other special fares. The Commission's report appears in the record at page 26.

At a later date the Commission made a state-wide order covering freight rates. Illinois lies partly in Eastern, partly in Southern, and partly in Western territory. Subsequent to the decision in *Ex Parte* 74

the Commission handed down a supplementary report providing in practical effect that Illinois should be considered as lying within Eastern territory, but that shipments into Western territory should take the 35 per cent increase and into Southern territory 33 1/3 per cent.

The State Commission, upon carriers' application for increases, permitted a temporary advance of 33 1 3 per cent, and upon the completion of a somewhat extended investigation prescribed rate schedules which it estimated would yield an average increase of upwards of 35 per cent and less than 40 per cent. The Federal Commission made a state-wide order advancing all intrastate rates 40 per cent. The following is from the report, page 103:

> "The Illinois Commission also points out situations arising from the 40 per cent increase in the Illinois district as compared with the 35 per cent increase between Illinois and points in western territory and the 33 1 3 per cent increase between Illinois and southern territory, pursuant to *Increased Rates, 1920.* The rate from Chicago to Davenport, involving a haul entirely within the Illinois district, takes an increase of 40 per cent, whereas from Chicago to points in Iowa just west of Davenport and in competition with it the increase has been but 35 per cent, thus lessening the rate difference that formerly existed in favor of Davenport. Rates on coal from Kentucky fields to Illinois points, involving hauls from the southern territory into the eastern territory, were increased 33 1 3 per cent, as against the increase of 40 per cent sought within Illinois. These situations are considered by that commission as justifying an intermediate percentage increase intrastate in Illinois as a border state. Situations of the kind cited are, of course, general and can be found at all points along the northern, western,

and southern borders of the Illinois district and in fact at any place in the country where any two of the rate grouping fixed in *Increased Rates, 1920, supra*, adjoin. The difficulty could have been avoided only by a horizontal increase for the entire country. This was recognized in our report.

"Some readjustments may be appropriate in individual instances *where substantial injury results*. An approval of the Illinois commission's rates would mean the approval of lower rates in Illinois, and indirectly lower rates perhaps west of the Mississippi River, than in official classification territory. Such inequalities as call for readjustment may be brought to our attention in the appropriate way and dealt with as occasion requires."

The State of Illinois has filed a bill to set aside this order in the United States District Court for the Northern District of Illinois. Its petition has been denied and appeal taken. This case will also be brought here as speedily as may be, so that its citizens may be protected in those "instances where substantial injury results" from the Commission's order, which instances the Commission seemed quite clearly to recognize would result.

ARKANSAS RATES AND FARES, 59 I. C. C., 471.

In this case the Commission made a state-wide order advancing all intrastate passenger fares, with the usual exception of commutation fares, excursion tickets and other special fares.

The carriers also asked the Commission to advance the intrastate rates on road-building material. It appeared that these rates were fixed by statute, but that the Arkansas Commission had authority to advance the rates. Upon this point the Commission made the following statement, at page 473:

"The desirability of concerted action of the state and federal regulatory bodies in all matters of transportation in which the power of both is involved has been given recognition in the interstate commerce act. The action of respondents in bringing the matter before us in advance of the filing of an application with the corporation commission and a determination by it renders difficult the coordinated action contemplated by Congress and deprives us of the benefit of such investigation and findings as the state authorities might have made. However, we are here confronted with practical questions for the solution of which Congress has provided a practical course of procedure by means of which substantial justice is assured. Respondents have elected to pursue that course and we are not vested with appellate power under which they might be remanded to tribunals of the state. But we are authorized to avail ourselves of the cooperation, services, records, and facilities of the state in the enforcement of any provision of the act, and we shall reserve for later determination the questions relating to rates on road-building materials."

No action of any sort, as far as we are aware, has been taken in this case since the report and order were issued. The validity of this order is in litigation in the Federal Courts.

Minnesota Fares and Charges, 59 I. C. C., 502.

In this case the Commission made a state-wide order advancing all intrastate passenger fares in Minnesota, with the usual exceptions. It is understood that the state is contesting the validity of the order, and that litigation will presently reach this court.

IOWA FARES AND CHARGES, 60 I. C. C., 55.

In this case the Commission made a state-wide order advancing all intrastate passenger fares and Pullman charges in Iowa, with the usual exceptions as to commutation and other special forms of tickets. The state is contesting the validity of the order in the Federal Court.

MONTANA RATES AND FARES, 60 I. C. C., 61.

In this case the Commission made a state-wide order advancing all intrastate passenger fares and Pullman charges in Montana, with the usual exceptions as to commutation and other special forms of tickets. The validity of the order is being litigated in the state and Federal Courts.

OHIO RATES, FARES AND CHARGES, 60 I. C. C., 78.

In this case the Commission made a state-wide order advancing all intrastate passenger fares, with the usual exceptions, Pullman charges, excess baggage charges, and rates on milk and cream transported on passenger trains, in Ohio. The validity of the order is being contested in the Federal Court.

MICHIGAN PASSENGER FARES, 60 I. C. C., 245.

In this case the Commission made a state-wide order advancing all intrastate passenger fares in the State of Michigan, making the usual exception as to commutation and other special forms of tickets. The advance has been enjoined by the Michigan State Court. Litigation involving the validity of the order is also pending in the Federal Court.

SOUTH CAROLINA FARES AND CHARGES, 60 I. C. C., 290.

In this case the Commission made a state-wide order advancing all intrastate passenger fares and Pullman charges, and decreasing the allowance of free baggage per passenger from 200 pounds to 150 pounds. The usual exception as to commutation and other special forms of tickets was made. The order also changed the minimum passenger fare from 5 cents, fixed by state statute, to 12 cents. During Federal control the minimum had been made 10 cents, but the carriers had applied the 20 per cent increase permitted by Ex Parte 74 to the minimum charge, making the same 12 cents. Concerning this the Commission said, at page 297:

> "In determining the reasonableness of the minimum charge of 12 cents consideration should be accorded the fact that prior to August 26, 1920, the minimum charge of 10 cents applied throughout the southern group on both interstate and intrastate traffic, and that in Ex Parte 74 we found an increase of 20 per cent justified in all passenger fares and charges. Taking into consideration also the services accorded a passenger traveling a distance less than 3 1 3 miles, we think the minimum charge of 12 cents not unreasonable, and the minimum of 5 cents less than reasonable, although the amount involved is so small that the carriers might well have kept the minimum at the more convenient sum of 10 cents.
>
> "The law requires us to fix rates, fares, and charges so that the carrier shall, under specified conditions, earn, as nearly as may be, a certain return upon the aggregate value of the railway property held for and used in the service of transportation, and it follows that to the extent that intrastate rates, fares, and charges do not contribute their proportionate share to such return they unjustly discriminate against interstate commerce.

> *While in this instance the intrastate minimum charge has no very substantial effect upon the revenues of any one carrier*, yet *if* the same charge were established throughout the southern group, and *if* similar discriminations were permitted in other minor rates, fares, and charges, the effect upon revenues *might become* considerable. It is clear that the question whether the intrastate charge is unjustly discriminatory against interstate commerce *does not depend upon the amount of revenue involved.*"

The carriers also asked the Commission to establish a conductor's penalty charge, to be paid without rebate by passengers boarding trains without supplying themselves with tickets. The Commission ordered a charge of 15 cents, saying, at page 298:

> "The conductor's penalty charge *is not levied for direct revenue purposes*, but to facilitate the efficient handling of traffic and the collection of fares, and it was not our intent in Ex Parte 74, although the language used may give color to the claim, to authorize an increase in charges of this character. We think, therefore, that the increase in the conductor's penalty charge from 15 cents to 18 cents has not been justified, but upon this record we are not prepared to *find* that 15 cents *is an unreasonable amount*. It is also our opinion that the absence of such a charge for intrastate application in South Carolina can hardly fail to have a prejudicial effect, not only upon intrastate, but upon interstate passenger traffic as well, and that it is unjustly discriminatory against interstate commerce. Our conclusion as to the amount is without prejudice to any further consideration of the charge in the future upon a more comprehensive record."

We call attention here to the fact that while the Commission said in the New York case (Record, p. 97):

> "There may be cases in which the connection of intrastate rates with the movement of interstate commerce is so remote and unimportant that we may properly disregard it. But in every case which puts in question intrastate rates, the decisive factor is whether or not they affect interstate commerce injuriously to a considerable extent."

when it comes to a concrete case its construction of the Act compels it to require absolute uniformity of rates, even though the amount involved is inconsequential, and the purpose of the charge *is not a revenue purpose at all.*

This case perhaps illustrates what Congress knew about the way a government department would act in regulating local matters. If the conductor's penalty charge is not designed for revenue, it would probably seem to Congress as if the legislature of a state might be permitted to determine whether 5 cents is a sufficient fine to permit the carrier to assess upon a passenger for putting it to the trouble of selling him a ticket on the train. But if the power to enforce uniformity is given to a federal department, the ideas of the people of a state upon the subject are of no consequence.

The validity of this order is being contested in the Federal court.

INDIANA RATES, FARES AND CHARGES, 60 I. C. C., 337.

In this case the Commission issued a state-wide order advancing all intrastate freight rates in Indiana, except coal moving less than 30 miles, and also advancing all passenger fares and Pullman and excess baggage charges, with the usual exception as to commutation and other special forms of tickets. The validity of this order is in litigation in the Federal Court.

In this case the Commission advanced all intrastate passenger rates, with the usual exception as to commutation and other special forms of tickets, and all freight rates without exception. The Nebraska Commission produced evidence that the rates in Nebraska yielded a 6 per cent return upon the value of Nebraska property. The following is from the report of the Commission touching that subject:

> "According to the computations of the Nebraska Commission, the increases it allowed would yield a return of about 6 per cent on $331,846,206, which was roughly estimated to be the value of the carriers' property in Nebraska devoted to state and interstate commerce. In other words, in limiting the carriers to the increases above stated, the Nebraska Commission proceeded on the theory that each state could create a rate group of its own in addition to those fixed by us under the act in Ex Parte 74. * * *
>
> "Neither the value of property nor the reasonableness of rates can be determined with mathematical exactness. The final test to be applied is a matter of informed judgment. Differences in judgment as among the several State Commissions, if each could and would create a rate group of its own, would obviously nullify the fundamental purposes of the transportation act.
>
> "The Nebraska Commission seems to be of the opinion that a 35 per cent increase in Nebraska intrastate rates would make them unduly high and require the people of the state to contribute in an unfair proportion to the total revenues of the carriers. That the rates in Nebraska might be made too high can not be proved by data of the kind used by the Nebraska Commission in com-

puting valuation. Moreover, if there are any conditions that justify less than a 35 per cent increase in this section of the west, the conditions are probably not circumscribed by the state's boundary lines, but affect interstate as well as intrastate rates."

The validity of this order is being tested in litigation pending in the State and Federal Courts.

North Carolina Fares and Charges, 60 I. C. C., 362.

In this case the Commission made a state-wide order advancing all intrastate passenger fares, with the usual exceptions, in North Carolina. It also made the same order with respect to baggage allowance and conductor's penalty charge as in the South Carolina case. The validity of this order is being contested in the Federal Court.

Utah Rates, Fares and Charges, 60 I. C. C., 338.

In this case the Commission made a state-wide order advancing all intrastate passenger fares, with the usual exceptions, and also excess baggage charges. The State Commission had allowed the passenger fare advance asked limiting it to 3.6 cents per mile. The Federal Commission denied carriers' application for an increase in coal and ore rates, it being shown that said rates were already upon a higher basis than the interstate rates.

Texas Intrastate Rates, 60 I. C. C., 421.

The order of the Commission in this case advances all passenger rates in Texas, with the usual exceptions, and also all freight rates without exception. The Texas

Commission had allowed an advance of 33 1/3 per cent as against an advance of 35 per cent in the western group allowed by the Federal Commission. The state offered evidence of valuations made by the State Commission and its experts, tending to show that the rates prescribed by the state were reasonable, based upon the value of the property devoted to that traffic. The manner in which this contention was disposed of by the Federal Commission has heretofore been referred to at page 130. The validity of this order will be contested, and may be expected to reach this court.

Other State Cases Involving Railroad Rates.

There are now pending before the Commission cases involving passenger fares or freight rates, or both, in nine other states. It is believed, however, that the decisions already made fairly well illustrate the character of orders towards which the proceedings look. To this statement the exception should be made that in the Illinois case the Commission is proceeding with an investigation looking towards the revision of intrastate commutation fares in and about Chicago.

Pennsylvania-Ohio Power and Light Company Case.

In this case, upon petition of the Pennsylvania-Ohio Power and Light Company, the Commission has ordered an investigation of fares in the Village of Hubbard, Ohio, on the lines of said company, upon petition of the company that they be increased. These fares are fixed by a franchise ordinance. The company operates an interurban system in and about Youngstown, Ohio, and one of its lines runs across the state line into Pennsylvania. It therefore sometimes

happens that interstate passengers ride from Pennsylvania over this line and throught the Village of Hubbard. This is the basis of the jurisdiction claimed.

THE PLAN ADOPTED BY CONGRESS FOR DEALING WITH INTRASTATE RATES.

Congress, in the Transportation Act, in the manner that has been hereinbefore outlined, adopted a definite, carefully considered plan regarding intrastate rates. It used its war power, in section 208-a, to nullify all state statutes and commission orders prescribing rates and fares. Thus far it was necessary to go to meet the emergency which had been produced by the war.

The fixation of the federal control rates in each state, until the state should act affirmatively with respect thereto anew, took care of the situation so far as pre-war state statutes and commission orders were concerned. So far as the future was concerned, evidently Congress discovered no reason for anticipating any catastrophe from the continued functioning of state governments as to local rates.

The matter of conflicts between state and federal requirements as to rates had been long before provided for. It was, however, deemed by Congress wise to perfect the then existing law touching that matter by enabling carriers, on the one hand, to institute proceedings to correct alleged discriminatory situations, and by giving to the state authorities, on the other hand, the right to take part in the proceedings. Thereby state rights were safeguarded from unintentional invasion, through lack of full understanding of local situations, and full knowledge of the reasons which had produced the state regulations complained of.

Congress had every reason to believe what Commissioner Clark believed, when he recommended the plan in a statement shown on page 8 of this brief. He then said:

> "Mr. Sanders of Indiana. Section 13 of this act, which proposes to amend section 13 of the original act, deals with that question of additional power which section 13 gives the Interstate Commerce Commission.
>
> "Mr. Clark. I do not think that it gives us any more power under the law. I do not think it expands or contracts the application of the terms of the law or the Commission's power thereunder, but it does define a relationship and outline a procedure that we hope will operate to minimize the number of instances in which undue prejudice will persist, and to simplify the removal of it where it may be found to exist."

Beyond doubt, the idea that Congress had in mind when it passed the Act was correctly stated by Commissioner Clark, when he explained it to the committee, as shown on page 80 of this brief. He then said:

> "The idea under the proposed amended act is that every reasonable, feasible effort shall be made to bring the conflicting views of the state commissions, if they do conflict, and the views of our own Commission into harmony through a very careful investigation which all are invited to participate in, and in which everybody would be heard, and in which every reasonable effort would be made to reach a mutually acceptable understanding; but the possibility of inability to reach such an understanding would be protected by a reservation of the power to finally decide it, if necessary, by the federal tribunal."

Congress thus placed the passenger fares, both interstate and intrastate, upon a basis of three cents or more, and left the states to function concerning those which were intrastate after the expiration of the guaranty period. In other words, Congress deemed it wise that the states composing the Union should be left, after the stress of war had passed, in the full free exercise of their accustomed powers. It had no wish to discover the limits of federal jurisdiction over interstate carriers engaged also in the transportation of intrastate commerce. It may be that many believed, as did Senator Cummins, whose words have been before quoted at page 100 of this brief, as follows:

> "But I do not want it to be understood that we have yet gone, and this bill does not propose to go, to the limit of our constitutional power. It leaves with the state authorities many things which, in my judgment, if we were to exercise our full power we could withdraw from the states. But the committee has not considered it wise to withdraw more than seemed to be absolutely necessary under existing conditions."

REASONS WHY CONGRESS REFUSED TO ATTEMPT TO BREAK DOWN STATE POWER.

In construing any act of Congress, which is open to different constructions, the court takes notice of, and gives weight to, the prevailing ideas concerning the subject-matter of the legislation, which would be likely to be entertained also by Congress, and to induce it to intend one construction or another. *United States v. Bitty*, 208 U. S., 393, 402.

Our political institutions and ideals and the whole fabric of our government are such as would predispose Congress to refuse the request of carriers to centralize

all regulation in a single board in Washington. Whether rightly or wrongly, our people have preferred to retain in the hands of their local governments power to conduct government locally. Under that plan the nation has not only grown great and powerful, but the people have maintained their political virility and capacity, and their confidence in the government, and their loyalty to it. Whether rightly or wrongly, they believe that no other plan of government would work so well.

It may be possible to improve upon that plan. Our people may sometime try to improve it, but there is no prevalent disposition to make the attempt now. There was not in 1920. There was no disposition then to enter upon the doubtful experiment of breaking down our state governments, and of centralizing their power in the hands of bureaus and departments at the federal capital. There was, instead, a reaction against centralization and against the bureaucracy that had been incident to the war. The desire was to return to "normalcy," and Congress was responding to the public will. All this is common knowledge.

Our political traditions, then, and the temper of the times both forbade that Congress should do otherwise than return the railroads to private control, subject to regulation by the federal and state governments respectively, each within their accustomed field, and with their accustomed powers.

That is what the committees which acted upon the bill said they intended to do, as has been heretofore pointed out. (See pages 89 and 100 of this brief.) That is what the terms of the Act, construed according to accepted canons of construction, seem to us plainly to provide.

It may be that it would have been wiser for Congress

to have authorized the Commission to prescribe all intrastate rates. We believe, however, that such action would have violated the fundamental law; and the terms of the federal compact must be observed, if it is to continue to bind together the peoples of 48 states, who have been reared in the knowledge that those states have sovereign rights.

It may be that the Constitution, if need be, ought to be amended to enable the Congress to dispossess the states of powers which they retained to themselves when they joined in the compact. We read that sometimes in papers where observant persons would expect to read it. The idea is sought to be inculcated that the states that compose the Union can not be trusted to legislate through their legislatures and commissions on the subject of railroad rates, and that hence the federal government must commit to a federal board in Washington the duty of legislating for them.

We submit that there are some reasons why the people of the states will fare better if they retain the power of regulation of railroads as to local matters instead of vesting it in a government bureau; and that Congress was in a very good position to know those reasons. Congress was also in a position to weigh intelligently the representations as to the necessity for centralization of this power of regulation, which were made to it by the carriers.

The carriers are corporate entities, but they are managed by men. These men are no better and no worse than the most of us. And they are just as human. It is contrary to human nature to like to be interfered with. Regulation is interference. If there was no occasion for interference, there would be no occasion for regulation, either state or federal. The men who manage the railroads would like to be left to

manage them exactly as seems wise to them. They know there is no chance that they can escape regulation, and hence they are in favor of that kind of regulation which will produce the least possible interference with them.

The state commissions are 48 in number; they are near to the people; and when complaints are brought to them they act on them quickly. A bureau in Washington, hundreds or thousands of miles away from people who want to complain, and buried in thousands of complaints that would suffice to keep 48 commissions busy, comes as near to ideal regulation from the railroad point of view as can be imagined. So the carriers are for "a strong and exclusive jurisdiction in the Interstate Commerce Commission."

Taken collectively, Congress doubtless knows more about the temper and disposition of the American people, and what they will do in the way of governmental action on a given subject, than any other like number of men who could be found in the country. Congress was able to form a fairly accurate forecast as to what the action of the state regulatory authorities would be, if the carriers should make application to them for rate advances, and show the same to be necessary. If their judgment was that the state governments could be depended upon to act with reasonable sense, it may be assumed that they would not be disposed to take the representations of carriers very seriously, and this fact may be taken into consideration in construing the Act which they passed.

ACTION OF ALL STATE COMMISSIONS ON CARRIERS' APPLICATIONS FOR ADVANCES.

As something which Congress was able to forecast, we think it proper to show what has actually happened

State	*Percentage Increase Allowed in Freight Rates.*	*Exceptions to Straight Percentage.*	*Percentage Increase Allowed in Passenger Rates.*	*Exceptions to Straight Percentage.*	*Pullman Surcharge.*	*Percentage Increase Allowed in Baggage Rates.*	*Percentage Increase in Rates on Milk and Cream.*
New York (1st Dist.).....	Same as I. C. C.		Statutory.		Denied as within statute.	Denied.	Denied.
New York (2nd Dist).....	Same as I. C. C.		Statutory.		Denied as within statute.	Denied.	Denied.
North Carolina	Same as I. C. C.		Statutory.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
North Dakota	Denied.		Denied.		Denied.	Denied.	Denied.
Ohio	Same as I. C. C.		Statutory.		Denied as within statute.	Denied.	Denied.
Oklahoma	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Oregon	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Pennsylvania	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Rhode Island	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
South Carolina	Same as I. C. C.	Switching charges in connection with intrastate line hauls are limited by statute.	Statutory.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
South Dakota	Same as I. C. C.	Tentative scales of class rates fixed applicable to traffic between stations on lines west of the Missouri River on the one hand and stations west. Also tentative maximum scales on the following commodities in carloads; grain and grain products, hay and straw, live stock, lignite, emigrant movables, fuel wood, sawdust and shavings; gravel, sand and stone, broken, crushed and ground. In some instances these scales permit advances of 35% above rates in effect at end of Federal control. Investigation by State Commission is proceeding for the purpose of fixing these excepted rates on a uniform basis with interstate rates.	Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Tennessee.....	Same as I. C. C.	No increases on carload shipments of sewer pipe, and road building material.			Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Texas	*33 1-3%		Statutory.		Covered by statute.	Same as I. C. C.	Not acted on.
Utah	Same as I. C. C.	No increase on coal and ore.	Same as I. C. C.	No increase above 3.6c per mile.	Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Vermont	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Virginia	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Washington	Same as I. C. C.	Increase on pulp logs suspended pending further investigation.	Same as I. C. C.	No increase in fares already 3.6c per mile.	Same as I. C. C.	Same as I. C. C.	Denied.
Wisconsin	Same as I. C. C.	No increase in rates authorized by Commission June 2, 1920, on Marinette, Tomahawk & W. R. R. because larger increase before granted.	Statutory.	20% increase on commutation but subject to statutory limit.	Under consideration.	Carriers allowed to file tariffs increasing rates subject to later approval.	Same as I. C. C.
West Virginia	Same as I. C. C.		Same as I. C. C.	No increase in fares now 4 cents.	Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Wyoming	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.

*Instead of 35% allowed by I. C. C.

State	Percentage Increase Allowed in Freight Rates.	Exceptions to Straight Percentage.	Percentage Increase Allowed in Passenger Rates.	Exceptions to Straight Percentage.	Pullman Surcharge.	Percentage Increase Allowed in Baggage Rates.	Percentage Increase in Rates on Milk and Cream.
Kansas	30% instead of 35% I. C. C.	Brick increased 1c per 100 lbs., cement 2c, crushed stone, sand and gravel ½c, coal sliding scale advance 15c to 40c per net ton. No increase on petroleum and its products.	Denied.		Same as I. C. C.	Denied.	Denied.
*Kentucky	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Louisiana	Same as I. C. C.	Sand, gravel, crushed stone, shells, etc., for road building not increased. Advances on cotton contingent on allowances being made compresses as now provided for compressing cotton in transit not less than 20c per cwt. Advances on rough and clean rice and sugar cane withheld pending further hearing.	Denied.		Denied.	Same as I. C. C.	Advance withheld pending further hearing.
Maine	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Maryland	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Massachusetts	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
*Michigan	Same as I. C. C.		Statutory.		Denied as within statute.	Same as I. C. C.	Same as I. C. C.
Minnesota	Same as I. C. C.		Statutory.		Same as I. C. C.	Denied as dependent on passenger fares.	Same as I. C. C.
Mississippi	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Missouri	Same as I. C. C.	Increase on coal, coke, brick, etc., sand, gravel, stone (except carved, etc.), crushed rock, chat, cinders, lime, cement, plaster, etc., petroleum and its products which will result in rates more than 70% above rates in effect June 24, 1918, withheld pending investigation.	Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Montana	Same as I. C. C.		Statutory.		Denied.	Denied.	Denied.
Nebraska	25% instead of 35% I. C. C.	No increase on brick and hollow tile. Rates on C. L. shipments of crushed rock, sand and gravel not to exceed 160% of rates in effect June 24, 1918.	Statutory.	20% increase on extra fare trains and for special trains.	Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
†Nevada	Denied.		Denied.		Denied.	Denied.	Denied.
New Hampshire	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
New Jersey	Same as I. C. C.	No increase on sand, gravel and broken stone for road building.	Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
New Mexico	Same as I. C. C.	No increase on carload coal between Carthage and San Antonio and on low grade ore between Santa Rita and Hurley and on logs in carloads from Thorean to Albuquerque.	Same as I. C. C.	No increase in fares already on basis of 4c per mile.	Same as I. C. C.	Same as I. C. C.	Same as I. C. C.

*Without Commission action.

†Carriers refused to offer evidence of necessity for increases asked, as required by State law, making the claim that I. C. C. order obligated the State Commission to make identical increases.

TABULATION SHOWING ACTION OF STATE REGULATORY COMMISSIONS ON CARRIERS' APPLICATION FOR RATE ADVANCES SINCE AUGUST 1, 1920.

State	*Percentage Increase Allowed in Freight Rates.*	*Exceptions to Straight Percentage.*	*Percentage Increase Allowed in Passenger Rates.*	*Exceptions to Straight Percentage.*	*Pullman Surcharge.*	*Percentage Increase Allowed in Baggage Rates.*	*Percentage Increase in Rates on Milk and Cream.*
Alabama	Same as I. C. C.	No increase on ore and limestone.	Same as I. C. C.		Denied.	Same as I. C. C.	Same as I. C. C.
Arkansas	Same as I. C. C.	No increase on sand, gravel and stone for road building.	Statutory.		Same as I. C. C.	Statutory.	Same as I. C. C.
*Arizona	Denied.		Denied.		Denied.	Denied.	Denied.
California	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Colorado	Same as I. C. C.	Denver & Salt Lake authorized to increase fares in Mountain Pacific 35% instead of 25%.	Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Denied.
†Connecticut	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
‡Delaware	Same as I. C. C.		Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Florida	Same as I. C. C.	Increase computed on Federal control rates until Oct. 1st; after that date on June 24, 1918, rates plus 25% and subject to Florida Classification and rules of that date.	Same as I. C. C.		Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Georgia	Same as I. C. C.	No increase on brick, cotton and cotton linters.	Same as I. C. C.	No increase to be made above 2.5c per mile.	Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
Idaho	Same as I. C. C.		Same as I. C. C.	No increase to be made above 2.6c per mile.	Same as I. C. C.	Same as I. C. C.	Same as I. C. C.
§Illinois	35%+		Statutory.		Denied as within statute.	Same as I. C. C.	Denied.
Indiana	33⅓%	No increase on brick and burnt clay. Commodities generally increased 10% except iron and steel, 16%. Rates on coal from gas belt not to exceed Indianapolis rate by more than 25c per ton Rates on coal from mines, maximum rate per ton 55c for 10 miles or less; 65c ten to thirty miles; Brazil, Clinton and Linter Districts to Terre Haute, 65c. Maximum switching rate on coal $10 per car. Sliding scale of maximum C. L. rates on straw from 6½c per cwt. to 16c.	Denied.		Denied.	Denied.	Denied.
Iowa	Same as I. C. C.		Statutory.		Statutor	Same as I. C. C.	Same as I. C. C.

* Carriers refused to offer evidence to justify increases asked, as required by state law, claiming I. C. C. order obligated the State Commission to grant identical increases.

† Without Commission action.

‡ Delaware has no Commission.

§ Illinois is partly in Eastern, partly in Southern, and partly in Western territory. I. C. C. advances 40 per cent Eastern, 35 per cent Western, and 25 per cent Southern. The increase permitted by Illinois was not a flat percentage, but upon rate schedules estimated by the Illinois Commission to yield over 35 per cent increase.

by decisions of state regulatory commissions since July 29, 1920, when the federal commission made its decisions in Ex Parte 74. We have digested the decisions of these commissions, and tabulated the results, so as to show at a glance the action which has been taken by each Commission upon applications of carriers for general rate advances. This tabulation appears opposite this page, and calls for no comment.

It may perhaps well be added that hearings before state commissions were not sought by carriers until Ex Parte 74 was decided, on July 29, 1920, and that in less than two months after that date, as these decisions show, hearings had not only been concluded, but orders had actually been issued in all states but three.

DISSENTING REPORT OF COMMISSIONER EASTMAN. OPINION OF JUDGE BENEDICT.

In the appendix to this brief will be found the concise and convincing minority report of Commissioner Eastman, in the New York case, which we consider the best statement we have yet seen touching the construction of the provisions of the Transportation Act, which the majority of the Commission rely upon. We incorporate the same herewith by reference as a part of this brief.

In the same way we incorporate the very able discussion of the constitutional questions involved, which is contained in the opinion of Judge Benedict, in *The People of the State of New York v. Long Island Railroad, et al.*, New York Supreme Court, unreported. This opinion, so far as it relates to the construction and constitutionality of the Transportation Act, is also in the appendix.

PART II.

THE COMMISSION FAILED AND REFUSED TO CARRY OUT THE DIRECTIONS OF CONGRESS IN FIXING THE INCREASES IN RATES, FARES AND CHARGES PRESCRIBED BY IT IN EX PARTE 74.

Paragraph 2 of section 15-a provides that:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole *(or as a whole in each of such rate groups or territories as the Commission may from time to time designate)* will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation."

In its opinion and findings in Ex Parte 74, 58 I. C. C., 225-226, the Commission says:

> "We find that *for the purposes set forth in section 15-a* the groups shall be as follows:
>
> *Eastern Group.*
>
> Its limits for the purposes of this proceeding may be established as follows: The Atlantic Seaboard from the Canadian Border to Norfolk, Va., the main line of the Norfolk & Western Railway, from Norfolk, Va., to Kenova, W. Va., the main line of the Chesapeake & Ohio Railway, from Kenova, W. Va., to Cincinnati, Ohio, the Ohio River to Cairo, Illinois, the Mississippi River, to the mouth of the Illinois River, at or near Grafton,

Illinois, the Illinois River, from Grafton, Illinois, to Pekin, Illinois, a line south and east of the Atchison, Topeka and Santa Fe Railway, from Pekin, Illinois, through Joliet and Streator, Illinois, to Chicago, Illinois, a line drawn from Chicago, Illinois, to include the southern peninsula of Michigan, and thence following the International boundary to the Atlantic Seaboard; including that portion of the Virginian Railway extending south of the southern boundary, and excluding those portions of the Southern Railway, Louisville & Nashville Railroad, Mobile & Ohio Railroad, Atlantic Coast Line Railroad, and Seaboard Air Line, extending north of the southern boundary.

Southern Group.

The territory commonly known as the Southern Classification Territory, embracing that section of the United States lying west of the Atlantic Ocean; South of the main line of the Norfolk & Western Railway from Norfolk, Va., to Kenova, W. Va., thence south of the Chesapeake & Ohio Railway to Cincinnati, and thence south of the Ohio River to Cairo, Illinois; thence east of the Mississippi River to New Orleans, La., and the mouth of the Mississippi River; and north of the Gulf of Mexico from the Mississippi River to the Atlantic Ocean; including also those portions of the Southern Railway, Louisville & Nashville Railroad, Mobile & Ohio Railroad, Atlantic Coast Line Railroad and Seaboard Air Line Railway, extending north of the northern boundary and excluding that portion of the Virginian Railway extending south of the northern boundary.

Western Group.

The territory lying west of the western boundaries of the eastern and southern groups, as above described; south of Lake Superior and of the International boundary line; north of the Gulf of

Mexico and the Rio Grande, and on and east of a north and south line running as follows: Following the boundary line between the State of North Dakota and the State of Montana and the boundary line between the States of South Dakota and Wyoming and Nebraska and Wyoming, to the line of the Union Pacific extending east from Cheyenne, Wyoming; then following the line of the Union Pacific westward to Cheyenne and from Cheyenne running southward through Denver, Colorado Springs, Pueblo, and Trinidad, Colorado; then following the line of the Atcheson, Topeka and Santa Fe Railway from Raton and Las Vegas, New Mexico, to Albuquerque, New Mexico; then south along the line of the Atcheson, Topeka and Santa Fe Railway to El Paso, Texas.

Mountain-Pacific Group

All that territory lying between the line last re-scribed and the Pacific Coast, not including Alaska."

After designating the groups, as provided in Section 15-a, the Commission says, on page 226 of their opinion, that:

> "The grouping *herein approved* differs somewhat from that proposed by the carriers, and, inasmuch as the record deals principally with the three major groups, it will be advisable to deal with the evidence as presented. In analyzing the results of operation for the various groups of carriers for the constructive year devised by them and for the first four months of 1920, we shall group the carriers as they were grouped in the applications filed in this proceeding."

On page 229 of the Opinion the Commission fixed the values of the groups *defined by the carriers* and in doing so, said:

"From a consideration of all of the facts and matters of record, and those which under section 15-a of the Interstate Commerce Act, we are both required and authorized to consider, we find that the value of the steam-railway property of the carriers subject to the act held for and used in the service of transportation is, for the purposes of this particular case, to be taken as approximately the following:

Eastern Group, as defined by the carriers	$8,800,000,000
Southern Group, as defined by the carriers	2,000,000,000
Western Group, as defined by the carriers, including both the Western and Mountain-Pacific Groups, herein designated	8,100,000,000
Total	$18,900,000,000"

On page 242 of the Opinion, the Commission fixed the increases in passenger fares and charges as follows:

"We conclude that increases as indicated next below may be made by all steam railroads subject to our jurisdiction serving the territory embraced in the groups hereinbefore designated.

1. All passenger fares and charges may be increased 20%. The term 'passenger fares' may be considered to include standard local or interline fares; excursion, convention, and other fares for special occasions; commutation and other multiple forms of tickets; extra fares on limited trains; club car charges.

2. Excess baggage rates may be increased 20%, provided that where stated as a percentage of or dependent upon passenger fares the increase in the latter will automatically effect the increase in the excess baggage charges.

3. A surcharge upon passengers in sleeping and parlor cars may be made amounting to 50% of the charge for space in such cars, such charge to be collected in connection with the charge for space, and to accrue to the rail carriers.

4. Milk and cream are usually carried in passenger trains, and the revenue therefrom is not included in freight revenue. The rates on these commodities may be increased 20%."

On page 246 of the Opinion the Commission fixed the percentage increases in freight rates for the carriers in the four groups designated by them as hereinbefore defined. And in doing so, said:

> "We are of opinion and find that the following percentage increases in the charges for freight service, including switching and special services, together with the other increases hereinbefore approved, would under present conditions result in rates not unreasonable in the aggregate under section 1 of the Act and would enable the carriers in the respective groups under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, to earn an aggregate annual railway operating income equal, as nearly as may be, to a return of 5½% upon the aggregate value, for the purposes of this proceeding, of the railway property of such carriers held for and used in the service of transportation and ½ of 1% in addition; eastern group, 40%; southern group, 25%; western group, 35%; mountain-pacific group, 25%."

The Commission recognized its duty to carry out the directions of Congress to group the carriers of the entire country *as a whole*, or to group such carriers *as a whole* in such rate groups or territories as the Commission might designate. They did not "initiate, mod-

ify, establish or adjust" rates for the carriers *as a whole*, but instead designated the four groups hereinbefore referred to as they were authorized to do by the statute.

Having designated the groups, it was the duty of the Commission to find the "aggregate value of the railway property of such carriers in each of such rate groups or territories" and to initiate, modify, establish, or adjust such rates so that the carriers as a whole in each of such groups will earn the aggregate annual net railway operating income necessary to produce a fair return upon the aggregate value of the railway property of such carriers in each of such groups.

Paragraph 4 of section 15-a provides that:

> "For the purposes of this section, such aggregate value of the property of the carriers *shall be determined by the Commission* from time to time and as often as may be necessary."

The same section provides the method and means to be used by the Commission in determining such aggregate value.

The Commission did not determine the aggregate value of the property of the carriers in the several groups designated by them, as defined in their order, but did determine such aggregate value in each of the *three groups defined by the carriers*. Ex Parte 74, 229.

However, when the Commission came to prescribe the percentage increases to be allowed on rates, fares and charges, it applied such increases to the business of the carriers located respectively in each of the eastern, southern, western and mountain-pacific groups as designated and limited by the Commission, as hereinbefore described. We call especial attention to the language

of the Commission, on page 229 of its Opinion, where it is said:

> "It is not deemed necessary for present purposes to apportion the aggregate value of the properties in the western group, as defined by the carriers, so as to show the value of the properties in the western and mountain-pacific groups as we have here defined them. Many of the important railroads are in and serve both groups into which we have divided the carriers' western group. It is not thought advisable to delay the decision of this matter to permit an accurate apportionment of the value of such properties, particularly as the result could not materially affect the determination we reach."

THE COMMISSION HAD NO AUTHORITY TO DEPART FROM THE METHOD POINTED OUT AND DIRECTED BY CONGRESS FOR ADJUSTING THE INCREASED RATES IN THE GROUPS DESIGNATED BY THE COMMISSION.

> "The Supreme Court of the United States has repeatedly asserted that all the officers of the Government from the highest to the lowest are creatures of the law and bound to obey it. The powers of each are limited and while some exercise powers which are defined in the fundamental law, the larger portion of them is of statutory creation with duties and powers prescribed and limited by law. Yet constitutions and statutes seldom define with precision the scope of any office. The common law may be relied on to supply many incidents, and others are based on what may be necessarily implied from the powers expressly conferred. *When a power is conferred by legislative enactment, it must be executed in the way directed by the law.*"
>
> 22 *Ruling Case Law*, 455;

Baltimore vs. Potter, 18 Md., 284, 79 Am. Dec., 686;
Baltimore vs. Eschbach, 18 Md., 276.

"The position of the courts as to ministerial duties is therefore square, whenever a duty is directed by law, it will be commanded by the Court. if the law so provides. It comes to this, then; the of its own motion, it will be enforced by the motion of the Court. All this is in consequence of our fundamental idea of the supremacy of law. The officer must act in accordance with law. The officer will be forced to act in accordance with law, if the law so provides, just as every person must act in accordance with legal process when forced to act, if the law so provides. It comes to this, then; the distinction between discretionary powers and ministerial powers and ministerial duties is in last analysis the question what the law is in any particular case."

Wymans Admistrative Law, 149, and cases cited.

In *Kansas City Southern Railway v. Interstate Commerce Commission*, 252 U. S., 178, the Supreme Court of the United States, after stating the requirements of the Valuation Act, "specifying the steps" to be taken in the performance of the general duties imposed on the Commission and the refusal of the Commission to obey the command of the statute "to ascertain and report *inter alia*, the present cost of condemnation and damages or of purchase of the lands, right of way and terminals of carriers in excess of their original cost or present value, apart from improvements" the Court said:

"It is true that the Commission held that its nonaction was caused by the fact that the command

of the statute involved a consideration by it of matters 'beyond the possibility of rational determination' and called for 'inadmissible assumptions,' and the indulgence in 'impossible hypotheses' as to subjects 'incapable of rational ascertainment,' and that such conclusions were the necessary consequence of the Minnesota Rate Cases, 230 U. S., 352. We are of opinion, however, that, considering the face of the statute and the reasoning of the Commission, it results that the conclusion of the Commission was erroneous, an error which was exclusively caused by a mistaken conception of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess.

And the significance which the Commission attributed to the ruling in the Minnesota Rate Cases, even upon the assumption that its view of the ruling in those cases was not a mistaken one, but illustrates in a different form the disregard of the power of Congress which we have just pointed out. Since, as Congress indisputably had the authority to impose upon the Commission the duty in question, it is impossible to conceive how the Minnesota Rate Ruling could furnish ground for refusing to carry out the commands of Congress, the cogency of which consideration is none the less manifest though it be borne in mind that the Minnesota Rate Cases were decided after the passage of the act in question.

Finally, even if it be further conceded that the subject-matter of the valuation in question which the act of Congress expressly directed to be made necessarily opened a wide range of proof and called for the exercise of close scrutiny and of scrupulous analysis in its consideration and application, such assumption, we are of opinion, affords no basis for refusing to enforce the act of Con-

gress, or what is equivalent thereto, of exerting the general power which the act gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise."

"So it is well settled that when such officers undertake, by virtue of the authority conferred upon them, to build up rights against third persons, especially where their acts may result in penalties or forfeitures against third persons, the limits and conditions imposed upon their authority must be rigidly observed, or their acts will be unavailing."

Mechem-Public Offices and Officers, 336.

Manifestly the Commission understood its duty under the law. This is shown by the statement of the Commission in the New York Case (Record, p. 98) where the Commission said:

"Congress has taken as the basis for determining a fair return for the railroads, the aggregate value of the railway properties in each group held for and used in the service of transportation. In making a tentative finding of the value of the railway properties in each group, for the purposes of our report, we included all the railway property of each carrier held for and used in the service of transportation. * * * Congress has directed that we allow rates that will yield in the aggregate a return of 5½ or 6 per cent upon the value of the railway property *in each of the groups*. There can be no doubt of the power of Congress to devise and provide for the carrying into effect of a plan for assuring to the nation's interstate railroads a fair return upon the value of their property; and the full control by Congress of this matter is not to be denied on the ground that the carriers' aggregate earnings are a commingling of intrastate revenue and interstate revenue."

The action of the Commission in this case is very similar to its failure to carry out the directions of Congress in making the valuation of the railroads of the country, which action was held to be illegal by this court in the Kansas City Southern Case. In the instant case the Commission not only failed to determine the value of the carriers' property in the groups designated by them, but wholly failed to find any value to be apportioned to the property of the carriers in either the Western or Mountain-Pacific groups. It should also be remembered that such valuation as the Commission did determine was not a value of the railroad property apportioned to any one of the four groups designated by the Commission, but such value as was designated and set out in the report of the Commission was a value determined by the Commission on the properties of the carriers located in three groups, defined by the carriers and not by the Commission. Congress did not direct the carriers to designate the rate groups, or to determine the value of their property in such groups. On the contrary, these duties were expressly imposed upon the Commission. As was stated in the Kansas City Southern Case, no excuse on account of the difficulty and magnitude of the task assigned to the Commission by Congress can be urged as a defense on the part of the Commission for its failure to carry out the directions of Congress. The question submitted to the Commission was one of the very greatest importance to the people of the entire country. Congress has provided the Commission with ample means and facilities for making the most thorough investigation possible and no limit as to the time required for making such investigation was stated or fixed in the statute.

The failure of the Commission to observe the re-

quirements of the law, as pointed out herein, renders its action unavailing and its orders in Ex Parte 74 and in this case should be held to be illegal and of no effect.

THE COMMISSION FAILED AND REFUSED TO OBSERVE THE REQUIREMENTS OF PARAGRAPH 3 OF SECTION 13, WITH REFERENCE TO HOLDING CONFERENCES AND JOINT HEARINGS WITH THE RAILROAD COMMISSION OF WISCONSIN.

For a number of years prior to the passage by Congress of the Transportation Act of 1920, the question of providing by law a rule whereby conflicts between interstate rates and intrastate rates might be prevented or removed by means of conferences and joint hearings between the Interstate Commerce Commission and state regulatory bodies having jurisdiction over the rates in question. This question was the subject of discussion at annual conventions of the National Association of Railway and Utilities Commissioners. In its annual report in 1916, 1917 and 1918, the Commission recommended to Congress that it be given specific authority to cooperate with State Commissions for the removal of conflict between state and interstate rates. The Chairman of the Commission advocated the proposed amendment to the law in his statement at the hearing before the Committee on Interstate and Foreign Commerce of the House of Representatives, 66th Congress, 1st Session, on H. R. 4374, and said:

> "The idea under the proposed amended act is that every reasonable, feasible effort shall be made to bring the conflicting views of the State Commissions, if they do conflict, and the views of our own Commission into harmony through a very careful

> investigation which all are invited to participate in, and in which everybody would be heard, and in which every reasonable effort would be made to reach a mutually acceptable understanding; but the possibility of inability to reach such an understanding would be protected by a reservation of the power to finally decide it if necessary, by the Federal Tribunal."

In 1916, Hon. B. H. Meyers, then Chairman of the Federal Commission, in an address before the National Association of Railway and Utilities Commissions, discussed the proposition as follows:

> "Every State Commission directly involved would be given an opportunity, in accordance with the law, to participate in the deliberations and to assist in formulating the final conclusions upon a record jointly made. The one rate within the zone of reasonableness, established through the joint efforts of the respective Commissions, would then apply to all business, state and interstate, and thereafter there could be no Shreveport case in that territory and with respect to that commodity."

The National Association of Railway and Utilities Commissioners, in 1917 and 1918, passed resolutions favoring the proposition. These resolutions and addresses were placed before the Committee on Interstate and Foreign Commerce during the hearings above referred to.

Congress, in response to what appeared to be the almost unanimous request of the Federal and State Commissions and shippers, amended the law by the adoption of paragraph 3 of section 13 of the Transportation Act of 1920, which reads:

"Whenever in any investigation under the provisions of this act, or in any investigation instituted upon the petition of the carrier concerned, which petition is hereby authorized to be filed, *there shall be brought in issue any rate, fare, charge, classification, regulation or practice made or imposed by authority of any state* or initiated by the President during the period of Federal control the Commission before proceeding to hear and dispose of such issue shall cause the state or states interested to be notified of the proceeding. The Commission *may confer with the authorities of any state* having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such state bodies and of the Commission; and to that end is authorized and empowered under rule to be prescribed by it and which may be modified from time to time *to hold joint hearings with any such state regulating bodies* on any matters wherein the Commission is empowered to act and where the rate-making authority of a state is or may be affected by the action taken by the Commission."

The record in this case discloses that rates made by the authority of the State of Wisconsin were in issue but no such conference or joint hearing was had between the Interstate Commerce Commission and the Railroad Commission of Wisconsin.

It may be argued that the language of the statute is permissive only and not mandatory and that the Commission could exercise its discretion as to whether it would hold such conferences and joint hearing with the regulatory bodies of the State of Wisconsin.

The provision of the statute authorizing the Commis-

sion to confer with the regulatory authorities of the state and to hold joint hearings with such state regulating bodies should be held to be mandatory according to the rule that where the word "*may*" or other permissive words are used in a statute relating to the performance of an act by a public official whenever the public interests or individual rights call for its exercise the language used is mandatory.

> "It is well settled in statutory interpretation that the word '*may*' may be read '*shall.*" In *Rock Island County Sup'rs v. United States*, 71 U. S. (4 Wall.) 435, 18 L. Ed., 419, after a summary of the authorities on the subject Mr. Justice Swayne says:
>
> 'The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the act before us or in equivalent language, whenever the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty;'"
>
> *Village of Kent v. United States* (U. S.), 113 Fed., 232, 237, 51 C. C. A., 189, 5 *Words and Phrases*, 4422.

> "The word '*may*' in a statute will be construed to mean '*shall*' whenever the rights of the public or third persons depend on the exercise of the

power or the performance of the duty to which it refers, and such is its meaning in all cases where the public interest and rights are concerned, or a duty is imposed on public officers, and the public or third persons have a claim *de jure* that the power shall be exercised."

People v. Commissioners of Highways, 22 N. E., 596, 597, 130 Illinois, 482, 6 L. R. A., 161;
Kane v. Footh, 70 Illinois, 587, 590;
Fowler v. Perkins, 77 Illinois, 271, 273;
Gillinwater v. Mississippi & A. R. Co., 13 Illinois, (3 Peck) 1, 3;
Schuyler County v. Mercer County, 4 Gill. 20;
State ex rel. Jones v. Laughlin, 73 Mo., 443, 449;
Columbus & C. R. Co., v. Mowatt, 35 Ohio St., 284, 287;
Hays v. Los Angeles County, 33 Pacific, 766 768, 99 Cal., 74;
Havermeyer v. Superior Court of City and County of San Francisco, 24 Pac., 121, 126, 84 Cal., 327, 10 L. R. A., 627, 18 Am. St. Rep., 192;
McLeod v. Scott, 26 Pac. 1061, 1065, 21 Or., 94;
Nave v. Nave, 7 Ind., 122, 123;
Bawsemer v. Mace, 18 Ind., 27, 32, 81 Am. Dec., 348;
Ex Parte Lester, 77 Va., 663, 673;
Newbury & C. Turnpike Road Co. v. Miller (N. Y.) 5 Johns Ch., 101, 105, 9th Am. Dec., 274;
New York & E. R. Co. v. Coburn (N. Y.) 6 How. Prac., 223, 224;
Medbury v. Swann, 46 N. Y., 200, 201;
Provisional Municipality of Pensacola v. Lehman (U. S.) 57 Fed., 324, 332, 6 C. C. A., 349;
Lovell v. Wheaton, 11 Minn., 92 101 (Gil., 57, 60);
Cutler v. Howard, 9 Wis., 309, 311;
Market Nat. Bank of New York v. Hogan, 21 Wis., 317, 319;
Blair v. Murphree, 2 South., 18, 19; 81, Ala., 454;
In re McCort, 34 Pac., 456, 457, 52 Kan., 18;

Five Words and Phrases, 4421. See also *Words and Phrases*, 2nd Series, 336, 337 and 22 *Ruling Case Law*, Sec. 116, p. 457.

The reason for avoiding the great inconvenience and expense attending the removal of alleged discrimination under the doctrine of the Shreveport case is so great that the Interstate Commerce Commission should be required to comply with the provisions of the transportation act in respect to the holding of conferences and joint hearings with State Commissions for the purpose of avoiding so far as possible conflicts between rate structures. The law now makes it the duty of the Commission to hold such conferences and hearings. It was enacted at their request with the hearty approval of all parties in interest and should not now be disregarded.

CONCLUSION.

For all the reasons hereinbefore set out the states, parties to this brief, ask that the Transportation Act of 1920 be held to be in violation of the Federal Constitution, and that the findings and orders of the Interstate Commerce Commission in Ex Parte No. 74, and in its Docket No. 11763, be held to be illegal and void, and that an order be entered directing the dismissal of plaintiff's bill of complaint.

Respectfully submitted,

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APPENDIX.

DISSENTING REPORT OF COMMISSIONER JOSEPH B. EASTMAN IN THE NEW YORK PASSENGER FARE CASE.

The report of the majority of the Interstate Commerce Commission in the New York Passenger Fare Case appears in the record at page 44. The dissenting report of Commissioner Eastman, however, does not appear. It is accordingly reproduced herewith in full, as follows:

INTERSTATE COMMERCE COMMISSION.

No. 11623.

IN THE MATTER OF RATES, FARES, AND CHARGES OF THE NEW YORK CENTRAL RAILROAD COMPANY AND OTHER RAILROAD COMPANIES IN THE STATE OF NEW YORK.

EASTMAN, *Commissioner*, dissenting:

I am unable to join in the decision of the majority, because I believe it goes beyond our lawful power. The objection is more than technical, for it concerns the basic relations between the state and federal governments, a matter of great moment.

In essence, the carriers' position is that when we authorize an increase in interstate rates under section 15 (a) of the interstate commerce act a corresponding increase must be made in intrastate rates; otherwise unjust discrimination against interstate commerce results which it is our duty under section 13 to correct. State commissions may be asked to authorize the intrastate increases, but they need be offered no evidence except the fact of our decision and have no real discretion. The carriers accept the logical consequence of this view, if I understand them correctly, by holding that applications to the state commissions are in sub-

stance a matter of courtesy and that we could, under section 13, either upon complaint or upon our own motion, prescribe the intrastate rates desired even if no such applications had been made. If this be so, it follows that we could practically at will deprive any or all of the states of authority over intrastate rates, for when such rates are once prescribed by our order under section 13 they can not thereafter be changed without our consent.

The record in the instant case is based upon and conforms to this general theory of our power, and it is the only theory, it seems to me, upon which the decision of the majority can in full measure be supported. I am unable to believe that it is sound.

The Supreme Court of the United States has said:

> In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. *Illinois Central R. R.* v. *Public Utilities Commission*, 245 U. S., 493, 510.

It is in the light of this wise and salutary rule that we should approach the issue before us, construing the provisions of the act with scrupulous respect for state authority. It is, I think, our duty to conclude that when the Congress expects us to exercise new powers at the expense of the states, we shall be told to do so in plain and unmistakeable terms.

In defining our jurisdiction, at the very beginning of the interstate commerce act, paragraph 2 of section 1 states that the provisions of the act shall not apply—

> To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not ship-

ped to or from a foreign country from or to any place in the United States as aforesaid.

The language is unequivocal, and there is no subsequent provision which runs counter to the limitation. It is interstate and not intrastate transportation with which the act has to do. Under paragraph 4 of section 13 it is true that we may prescribe intrastate rates, but only for the purpose of removing unjust discrimination against interstate commerce. Plainly this power springs from and is merely an incident of the duty to regulate and protect interstate traffic.

Turning to section 15 (a), our duty to establish rates which will enable carriers to earn a fair return upon the aggregate value of their railway property relates and is confined to *interstate rates*. Without regard to the limitation of section 1, there is no "clearly manifested purpose" to extend our authority over intrastate rates, and certainly there is none in view of this limitation. Nor is such a conclusion inconsistent with a reasonable interpretation and practical application of this section. A rule is laid down for our guidance, but our duty is confined to interstate rates and it is a duty merely to maintain such rates at the level which will yield the return desired, assuming that the states will exercise their own power justly and taking into consideration our right to correct intrastate rates which unjustly discriminate against interstate commerce.

At this point we may consider for a moment whether or not there is reason to believe that the Public Service Commission of New York is disposed to deal justly with the carriers. Following our decision in *Increased Rates, 1920, supra*, applications were filed with that commission for authority to make like increases in intrastate rates, fares, and charges. With a few minor exceptions the freight increases sought were permitted at once to become effective, as was possible under the state statutes, without indication of approval or disapproval and subject to complaint or investigation in the future. The situation was different as to passenger

fares. By a provision of the New York law these are limited to a maximum of 3 cents per mile, but the state commission pointed out that it could permit fares in excess of this limit upon a showing that existing fares were insufficient to afford reasonable compensation for the service rendered. Notwithstanding this intimation the carriers offered no evidence and did not assert that the fares were insufficient, but relied upon the fact that we had permitted an increase of 20 per cent in the interstate fares. Under the circumstances no course seemed open to the New York commission except to deny the application, and this it did upon the sole ground of lack of evidence.

There is no basis for a belief that the New York commission is disposed to deal other than justly with the carriers, or that it would have been unduly exacting if they had undertaken to show insufficiency of compensation. Upon the facts before us and in a spirit of comity the carriers might well be remitted to the state tribunal to exhaust their remedies before coming to us for action which will deprive the state of all authority over intrastate fares so long as our order remains in effect. In this view of the matter whatever losses in revenue the carriers may have suffered are chargeable to their own default.

But approaching the matter solely from the viewpoint of our own jurisdiction, it is clear, I think, that for such authority as we possess over intrastate rates we must now look to the provisions of section 13. The question at once arises whether by reason of this section we have an essentially different issue before us than has frequently been considered under section 3 of the act to regulate commerce in so-called "Shreveport cases." The carriers assert that the issue is different because section 13 not only prohibits "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand," but also prohibits "any undue, unreasonable, or unjust discrimination against interstate

or foreign commerce." Their view, as I understand it, is that the word "discrimination" in this latter phrase is equivalent to the word "burden," and that the effect is to prohibit what was not prohibited by section 3, namely, an unduly low level of rates within the state which is yet not alleged or shown to be unduly preferential of or unduly prejudicial against any particular person or community.

This conclusion I find it difficult to accept. Upon protest the conference committee of the Senate and House of Representatives struck from section 13 the words "undue burden" and wrote in their place the words "undue, unreasonable, or unjust discrimination," which now are there. I hesitate to believe, as the carriers urge that no change in meaning was intended or accomplished by this change in words. Moreover, in speaking of section 3 of the act to regulate commerce in the consideration of the original *Shreveport Case*, the Supreme Court of the United States said:

> It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. (*Houston East & West Texas Ry. Co.* v. *United States*, 234 U. S., 342, 356).

Surely this language is quite as broad as the words in section 13 to which our attention is now directed.

If the issue before us is not essentially different from the issue which has been considered in prior "Shreveport cases," it will, I think, be conceded that while the evidence may be sufficient to justify action against certain intrastate fares and charges, it is not sufficient to justify the all-embracing action which the majority approve. This is indicated by the fact that the carriers have not seen fit to rely upon preference to persons or

communities, none of which are complaining, but have rested their case chiefly upon the allegation that the intrastate rates are upon a lower level than the interstate and fail to contribute their fair share of the railway operating income to which we have found that the carriers in the eastern group are entitled. For the reasons above stated I doubt our power to change state rates upon this ground. It falls nothing short of an appellate power to substitute our judgment as to the reasonableness of such rates for the judgment of the states. But assuming that we possess this power, is the evidence sufficient to justify us in exercising it?

Stating the question differently, is there evidence that the intrastate fares and charges in question are not producing their fair share of railway operating income and, if they are not, that the percentage increase desired is necessary to bring them to the proper level? That is not, it seems to me, an inevitable conclusion from our decision in *Increased Rates, 1920, supra,* and in this connection it is desirable to understand clearly the purport and effect of that decision. We were there faced with the necessity of providing without delay the additional revenue needed to bring the aggregate income of the carriers to the level prescribed by the act, and we adopted the expedient of authorizing horizontal percentage increases in rates, fares, and charges within and between certain territorial groups. This expedient was necessary, for any detailed consideration of individual rates was impracticable in the time available. Nevertheless, it should be noted that the act does not prescribe this method of increasing rates, that our duty under section 15 (a) is a continuing duty, and that our finding was only that the method employed would "result in rates not unreasonable in *aggregate*." It rested upon the assumption that extensive readjustment would probably be necessary. It is not equivalent to a finding that individual rates, fares, and charges, or classes of rates, fares and charges, so increased and now in effect, are just and reasonable. Still less does it follow as a necessary conclusion, where state authority is involved,

that the passenger fares within any particular state must be increased 20 per cent in order to produce their fair share of railway operating income. But if our decision in *Increased Rates, 1920,* is not evidence of that fact, certainly there is no other evidence of record upon which such a conclusion can be based.

No doubt it may be unnecessary that the individual fares and charges within the state should all be considered separately or that the value of the property used in the intrastate transportation should be established and the return now earned upon that value estimated by elaborate computations. But I am unable to escape the conclusion that even if the theory of the carriers as to our power under section 13 be accepted, at least it should be shown, by evidence sufficient to justify a valid opinion, that the intrastate fares and charges in question are not now furnishing adequate compensation for the service rendered judged by the standard which the Congress has set forth, and that an increase of 20 per cent is necessary to this end.

Summing the matter up, without going into further detail, I am of the opinion that upon the record before us the decision of the majority involves the exercise of a power which goes beyond any "clearly manifested purpose" of the Congress, and which we ought not to attempt to exercise until it is conferred upon us in plain and unmistakable terms. Nor would such a conclusion leave the carriers without a remedy, if they are prepared to bring the necessary evidence to the attention of the New York commission.

OPINION OF BENEDICT, J., IN PEOPLE V. LONG ISLAND RAILROAD, ET AL., NEW YORK SUPREME COURT, KINGS COUNTY, UNREPORTED:

BENEDICT, J.—This is an application for the granting of a temporary injunction restraining the defendants from increasing the rates of fare charged by them for the carriage of passengers, excess baggage and a certain class of freight. It comes here upon an order to

show cause issued on the application of the Attorney-General on behalf of the People of this State.

The ground for the relief asked is that the defendants propose to put in force rates higher than those allowed and approved by the laws of the State and the orders of the Public Service Commission. The defendants set up an order of the Interstate Commerce Commission as a defense and a ground for denying the relief asked.

The briefs and motion papers in this cause were submitted to the Court on December 11th, and, as the matter is of some importance to the public, as well as to the litigants, I have deemed that a prompt statement of my reasons for the conclusions which I have reached may not be without interest to them. I do not indulge myself in any illusion that certain views which will be expressed in this memorandum will have any weight in the ultimate determination of this litigation. I am compelled, however, to call attention to them because they seem of late to be forgotten or overlooked too frequently by law makers, and at times also by high judicial tribunals. Before taking up the matters referred to, I wish to speak of two objections which are made by the respondents and upon which they oppose this application.

First. The respondents urge that, unless the right be clear and certain, the injunction should not issue. While this is always true in respect of permanent injunctions, the rule is not the same in regard to interlocutory relief. It is an established rule of equity jurisprudence that when an application is made to the court for an injunction *pendente lite*, if there appears to the court reason for believing from the papers submitted, including sufficient averments in the complaint, that the plaintiff will be successful in the suit upon grounds which are cognisable in a court of equity, that court may, in its discretion, use the power of injunction to maintain the *status quo* until it can be determined, after a complete hearing of the cause, whether the plaintiff is, upon the facts to be ascertained, entitled to the relief sought, since, otherwise, the plaintiff, although he

should ultimately prevail, might lose, pending the suit, rights or property to which he was found to be entitled but which could not later be restored by the decree. In other words, the object of a preliminary or interlocutory injunction is to prevent irreparable injury pending the final ascertainment of the right, but not to determine the right itself.

Secondly. The respondents urge, further, that this action is improperly begun by the Attorney General on behalf of the People. This suggestion may be said to embrace two inquiries:

(a) Can the People of the State maintain such an action?

(b) Can it be instituted on their behalf by the Attorney General?

As to the first, I think it cannot be doubted that if the act of any person, artificial or natural, involves or may involve an unlawful invasion of the rights, privileges or immunities of all the inhabitants of the State, then the State, itself, may come into a court of equity for the purpose of preventing or restraining the wrong. I believe this to be true notwithstanding similar action may be taken by specific individuals, political subdivisions of the State, or boards of legislative creation claiming that special or peculiar injury will result to them if the unlawful acts be not prevented. The reason for this is plain. All power of government in the State is derived from the People themselves. They have, from time to time, established written constitutions. These constitutions, unlike the Federal Constitution, are not grants of power, but, on the contrary, are limitations "of the powers, of the people themselves, self-imposed, by the constitutional compact" (see People v. Draper, 15 N. Y., 528, a case which was applied in Oregon R. etc. Co. v. Campbell, 173 Fed. 979, where it was held that a State was not precluded from regulating carriers and rates between points within the State). Judge Denio said in the text case, referring to the creation of police powers by an act claimed to be unconstitutional:

> "As a political society, the State has an interest in the repression of disorder, and the maintenance of peace and security in every locality in its limits."

So here the same principle applies to the regulation of rates of fare affecting the interests of all the people of the State, in so far as the State has power to control and has undertaken to fix those rates. Similar principles not infrequently have been applied in our State jurisprudence, as, for example, the right of the people to the use of the foreshore upon navigable waters (People v. Steeplechase Park Co., 218 N. Y. 459); the right of the people to the forest preserve (People v. Adirondack Railway Co., 160 N. Y. 225, 234); the right to secure the removal of a public officer (People v. Ahearn, 196 N. Y. 221); the right to determine the amount of franchise tax to be paid by a corporation (People v. Albany Insurance Co., 92 N. Y. 458); the right to enforce an alleged forfeiture of a railroad company's charter (People v. Albany & Vermont R. R. Co., 77 N. Y. 232; also People v. Atlantic Ave. R. R. Co., 125 N. Y. 513) the right to determine whether a foreign corporation is "doing business within this State" (People v. American Bell Telephone Co., 117 N. Y. 241); the right to restrain the completion of a pier and to compel the removal of so much as had been erected (People v. N. Y. & S. I. Ferry Co., 68 N. Y. 71). In these and many other similar cases the courts have taken cognizance of the right of the people of the State, acting through their Attorney General, to sue directly to enforce rights belonging to all the people, as distinguished from that class of proceedings instituted by what are called "State writs" sued out by individuals to enforce private rights or by public officers in actions or special proceedings to which the people are a party. As to the second inquiry as to the right of the Attorney General to institute the proceeding, I think there is no doubt of his power in the premises.

* * * * * * * *

In England the Attorney-General represents the crown for all forensic purposes and may even be sued in chancery as representing the crown when the relief sought is in the form of a declaratory judgment or otherwise against the Crown (*Dyson* v. *Atty. Gen.* [1912], 1 Ch. 158). The prerogatives pertaining to the Crown in England are in this State vested in the people, and the necessity for the existence of a public officer charged with the protection of public rights and the enforcement of public duties by proper proceedings in the courts of justice is just as imperative here as there (see *Hunt* v. *Chic., etc., R. Co.* 20 Ill. A. 282, rev'd on other grounds, 121 Ill. 269; also *State* v. *Bryan*, 50 Fla. 293, 350). Indeed, I am not at all sure but that the rule asserted in *Monk* v. *Ouimet* (19 L. C. Jr. 71), to the effect that the right of the Attorney-General for the Province of Quebec to appear for the Crown cannot be questioned by a private person, does not apply by parity of reasoning to the present case.

Upon the foregoing considerations, I conclude that the present action is properly brought by the Attorney-General in the name and for the benefit of the people of this State.

* * * * * * * *

This case arises by reason of the threatened action of the defendants in increasing rates in contravention of the laws of this State and the orders of the Public Service Commission having jurisdiction. The defendants seek to justify their intended action under a certain order made by the Interstate Commerce Commission claimed to have been made pursuant to authority conferred by the act of Congress known as "Transportation Act 1920," which became a law February 29, 1920, and which provided for the return to their owners of the railroads of which the Federal government had taken possession and which it had operated since December 28, 1917. It is well known that during the period of Federal operation the fares for transportation of passengers on the railroads in New York State and elsewhere were fixed at the rate of three cents a

mile, and rates were fixed for other purposes higher than the theretofore existing rates.

* * * * * * * *

Three questions are presented by this action.

1. Has Congress the power either directly or through the Interstate Commerce Commission to fix intrastate rates on lines of intrastate carriers?

2. Did Congress confer that authority upon the Interstate Commerce Commission?

3. Assuming both the foregoing questions to be answered in the affirmative, did the facts presented to the Interstate Commerce Commission give it jurisdiction to make the order under the Act; or, in other words, is its action within the authority conferred on it by Congress?

The motion presents the question whether there is sufficient ground to believe that Congress did not have such power, or that it did not confer such authority upon the Commission, or that facts do not exist to justify the exercise of such authority upon the Commission, if the Commission possesses it, to warrant this Court in granting an injunction *pendente lite* to restrain the defendants from putting into effect the proposed increases in rates until these questions can be determined after a full examination upon the trial.

Preliminary to any discussion of these questions, it is necessary to set forth briefly just how far the United States Supreme Court has gone in sustaining the exercise of Federal power over intrastate rates of transportation. It is not necessary to go back of the Minnesota Rate Cases (230 U. S. 352), for the opinion in those cases contains a review of the authorities up to that time. In that case it appeared that the intrastate rates charged between points in Minnesota by certain interstate carriers, pursuant to directions of the Railway and Warehouse Commission of that State, were discriminatory in favor of certain cities situated near the border line, as against cities situated in adjoining states. Yet it was held that the fixing of such rates by the State authorities did not of itself constitute a bur-

den upon interstate commerce, and was not unconstitutional as an interference with interstate commerce in the absence of any act of Congress pertaining to the subject, and that the Interstate Commerce Act of 1887, as amended, did not, in the absence of a finding by the Interstate Commerce Commission that the State rates were unjustly discriminatory, operate to take away or restrict the State power to fix rates for intrastate traffic, because it contained a proviso that it should not apply "to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid." The Minnesota rates were, however, held confiscatory and therefore unconstitutional.

The next important case was *Houston & Texas Railway* v. *United States* (234 U. S. 342), the so-called Shreveport Case. In that case it appeared that certain interstate carriers whose railroads ran between Shreveport, Louisiana, and Dallas and Houston, Texas, charged rates for intrastate transportation in Texas, fixed by the local authorities in that State, proportionately less than the interstate rates from Shreveport to points in Texas, which latter rates had been approved as reasonable and authorized by the Interstate Commerce Commission; that there was territory in Texas which was competitive territory as between Shreveport on the one hand and Houston and Dallas on the other, and that this difference between interstate and intrastate rates constituted a prejudicial discrimination against Shreveport and in favor of Houtson and Dallas and that the Interstate Commerce Commission had power to direct an equalization of the rates by which order the carriers were relieved from the obligation to maintain the intrastate rates fixed by the Texas authorities and could increase such rates to conform to the interstate rates fixed by the Interstate Commerce Commission.

In *American Express Company* v. *Caldwell* (244 U. S. 617), the intrastate express rates fixed by local

authorities in South Dakota were lower than the interstate express rates fixed by the Interstate Commerce Commission. Shippers located in Sioux City, Iowa, complained that they were prejudiced by this discrimination, in that it resulted to the advantage of competitors in certain cities in South Dakota with respect to certain competitive territory in the latter State. The Interstate Commerce Commission made an order forbidding the express companies, which were interstate carriers, from charging higher rates between Sioux City and points in the competitive territory in South Dakota than they charge between the specified South Dakota cities and the same points. The express companies sought to put in force increased rates for intrastate traffic, to and from the said South Dakota cities, but the State authorities refused to approve such rates, and an action was commenced in the South Dakota courts by the Attorney-General of that State to enjoin the companies from putting them in force without the sanction of the State authorities. On writ of error to the Supreme Court of South Dakota, the Federal Supreme Court held that so far as the competitive territory was concerned the companies were by the order of the Interstate Commerce Commission authorized to increase their intrastate rates, but not outside of the competitive territory.

Finally, in *Illinois Central Railroad Co.* v. *State Public Utilities Commission of Illinois* (245 U. S. 493), the question was whether an order of the Interstate Commerce Commission directing an increase of intrastate rates on certain interstate railroads running between St. Louis, Missouri, and Keokuk, Iowa, on the one hand, and Chicago on the other, was valid. The Court held that the order was too indefinite as to just what intrastate rates should be increased to be enforced, but the power of the Interstate Commerce Commission to increase intrastate rates on interstate roads was reiterated. It was made to appear that the lower intrastate rates resulted in a discrimination as to competitive territory in Illinois in favor of Chicago, Hamil-

ton and East St. Louis, in that state, and against Keokuk and St. Louis, in the States across the Mississippi. The railroads affected by that case appear to have been interstate roads, although that fact is not expressly stated.

The conclusion to be derived from these authorities is that if Congress, or the Interstate Commerce Commission under authority of Congress, fixes rates for interstate carriers in any locality, and intrastate rates fixed by State authorities are different from the intrastate rates, and the difference results in discrimination to the prejudice of individuals or localities, Congress, or the Interstate Commerce Commission acting under authority of Congress, has power regardless of the action of the State authorities, to fix intrastate rates on the lines of such interstate carriers, so that such prejudicial discrimination shall be removed.

The present case involves a still further and more drastic assertion of power on the part of the Federal government. It now seeks to lay its hand on purely intrastate carriers and to exercise over their rates for intrastate transportation the same authority it has exercised over the intrastate rates of interstate carriers. If it shall succeed in establishing its right so to do, the last vestige of state authority over carriers' rates will be destroyed.

Coming now to the discussion of the three questions propounded above, I will take them up in inverse order. First, then, assuming that Congress has such asserted power over the rates of intrastate carriers, and that it has invested the Interstate Commerce Commission with authority to exercise that power, did the facts presented to the Commission as a basis for its order of November 13, 1920, give it jurisdiction to make that order? A reading of the opinions delivered in the several decisions of the United States Supreme Court above referred to will make it evident that the evil aimed at was discrimination prejudicial to individuals or localities, and that in the absence of such discrimination the Interstate Commerce Commission has no

power to fix intrastate rates. Thus in *Houston & Texas Railway* v. *United States* (Shreveport case, *supra*), Mr. Justice Hughes said:

> "It is apparent from the legislative history of the act [Interstate Commerce Act] that the evil of discrimination was the principal thing aimed at, * * *." (P. 356.)

And again:

> "It [Congress] did not undertake to authorize the Commission to prescribe intrastate rates and thus to establish a unified control by the exercise of the rate-making power over both prescriptions of traffic. Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier and subject to the authority of the States or of the agencies created by the States." (P. 357.)

In that case, as already noted, the discrimination was against Shreveport and in favor of Houston and Dallas in competitive territory in Texas. In the American Express Company case (*supra*), the discrimination was between shippers in an Iowa city and shippers in South Dakota with respect to competitive territory in the latter state. In the Illinois Central case (*supra*), there was discrimination in favor of cities in Illinois against cities in adjoining states with respect to competitive territory in Illinois. These cases were of course based upon the Interstate Commerce Act as it existed prior to the amendment of Section 13 by the Transportation Act of 1920. But these amendments, particularly the added paragraph numbered 4, above quoted, make it clear that discrimination is still the evil aimed at. It is provided in said paragraph that if the Commission finds, upon investigation, "that any such rate, fare, charge, classification or practice [that is one 'made or imposed by the authority of any State,' paragraph (3)] causes

any undue or unreasonable advantage preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce'' the Commission shall prescribe ''the rate, fare or charge, or the maximum or minimum, or maximum and minimum thereafter to be charged, and the classification, regulation or practice, thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination.'' This means, I take it, that differences between intrastate and interstate rates shall not be permitted if they operate to the prejudice of individual travellers or shippers, or to the prejudice of competing cities or localities in the territory served by a railroad, or to the prejudice of interstate commerce passing over any railroad. The Interstate Commerce Act still contains the provision that it shall not apply to transportation of passengers or property wholly within one state and not shipped to or from a foreign country (Section 1, paragraph 2).

There is not a single fact appearing in the report of the Interstate Commerce Commission on which the order of November 13, 1920, was based to show that as to either of the defendants in this action, the difference between intrastate and interstate rates results to the prejudice of any individual or of any city or locality competing with another city or locality in territory served by the defendants' roads, nor that interstate commerce over said roads in the four respects under consideration in this action is or will be in any wise hindered, diverted or subjected to unfavorable conditions not affecting intrastate commerce as well, nor that interstate commerce will be subjected to unreasonable or oppressive charges. The object sought to be accomplished by the order of July 29, 1920, was to raise rates to such an extent as to provide that the Interstate Commerce Commission considered a proper revenue for the railroads, so as to permit a return of 5½ per

cent on the capital invested, after allowing for expenses and improvements, pursuant to paragraphs 2 and 3 of Section 15-a of the Interstate Commerce Act, as amended by the Transportation Act of 1920. The ground on which the Commission acted in making the order of November 13, 1920, is well set forth in the dissenting report of Commissioner Eastman as follows:

* * * * * * * *

> "In essence, the carriers' position is that when we authorized an increase in interstate rates under section 15 (a) of the interstate commerce act a corresponding increase must be made in intrastate rates; otherwise unjust discrimination against interstate commerce results which it is our duty under section 13 to correct. State commissions may be asked to authorize the intrastate increases, but they need be offered no evidence except the fact of our decision and have no real discretion. The carriers accept the logical consequence of this view, if I understand them correctly, by holding that applications to the state commissions are in substance a matter of courtesy and that we could, under section 13, either upon complaint or upon our own motion, prescribe the intrastate rates desired even if no such application had been made. If this be so, it follows that we could practically at will deprive any or all of the states of authority over intrastate rates, for when such rates are once prescribed by our order under section 13 they can not thereafter be changed without our consent."

The purpose and object of the Commission seems to have been not to prevent discrimination against individuals or localities or aginst interstate commerce passing over New York railroads, but to compel intrastate traffic in New York, whether over interstate or intrastate lines, to bear what the Commission considered its fair share of the cost of railroad traffic and of a fair return on the capital invested, taking all the railroads,

intrastate and interstate, as a whole. This is more evident by the following excerpts from the majority report:

> "In accordance with these statutory provisions we designated four rate groups, one of which embraces the territory bounded on the west by the Mississippi River and on the south by the Ohio River and the main line of the Norfolk & Western Railway; and we authorized increased rates, fares, and charges that were designed to enable the carriers as a whole in that rate group, 'under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment,' to earn an aggregate annual net railway operating income equal, as nearly as may be, to 5½ per cent upon the aggregate value of the railway property of such carriers in that group, plus one-half of 1 per cent of that aggregate value for improvements, betterments, or equipment, chargeable to capital account.
>
> "Congress has taken as the basis for determining a fair return for the railroads, the aggregate value of the railway properties in each group held for and used in the service of transportation. In making a tentative finding of the value of the railway properties in each group, for the purposes of our report, we included all the railway property of each carrier held for and used in the service of transportation. This should not be construed as holding that jurisdiction over intrastate rates and fares has been taken away from the states, and reposed in us. We find nothing in the law to indicate that such was the intent of Congress. But Congress has directed that we allow rates that will yield in the aggregate a return of 5½ or 6 per cent upon the value of the railway property in each of the groups. There can be no doubt of the power of Congress to devise and provide for carrying into effect a plan for assuring to the nation's interstate railroads a fair return upon the value of

their property; and the full control by Congress of this matter is not to be denied on the ground that the carriers' aggregate earnings are a commingling of intrastate revenue and interstate revenue.

* * * * * * * *

"The record shows that the refusal of the State of New York to permit the carriers to increase the rates and fares here in controversy to the extent approved by us is costing the railroads between $11,000,000 and $12,000,000 annually. In other words, the annual earnings of the interstate carriers operating in New York are now between $11,000,000 and $12,000,000 less than they would be if the general level of rates and fares approved by us had become effective on intrastate traffic; and to that extent the declared purpose of Congress is defeated by a preferential basis of rates and fares maintained by authority of the State of New York."

In other words, these excerpts, together with the order of the Commission requiring increases of rates by intrastate carriers on intrastate transportation to correspond with the interstate rates fixed by the Commission, means that the Commission is attempting to establish a "unified control" over all the railroads of the country, interstate and intrastate, such as it was said in the Shreveport case (*supra*) Congress did not intend to authorize (234 U. S. at p. 357). It is true that discrimination is found in the report in general terms, and in the instance of one railroad, the New York Central, facts are set forth in support of such finding. But, as already stated, no such facts appear so far as the defendants in this action are concerned.

Nor do any facts appear in the opposing papers which show undue discrimination against interstate commerce, or between individuals or localities in interstate commerce on the one hand and intrastate commerce on the other. The passengers who travel on through

tickets over the Long Island Railroad to or from points outside of New York State are not shown to be sufficient in number to justify that intrastate carrier in setting at naught the commands of the State authorities. So far as such passengers are concerned, they can prevent any discrimination at all by breaking their journey in New York City. As to the Staten Island Company, the relatively few who use the ferry in connection with the railroad can likewise avoid all discrimination by buying ferry tickets separately. Since the trains and boats do not connect this will not prove a hardship. Persons traveling in parlor cars on the Long Island Railroad will not be affected, for it is not shown that the railroad carries any through parlor cars, nor that there are through parlor car tickets or rates in connection with parlor cars operated on other roads running to points outside of New York State.

From all this the conclusion follows that the Interstate Commerce Commission, even assuming that Congress has lawfully authorized it to fix intrastate rates on intrastate railroads to prevent discrimination, has exceeded its authority, and that facts did not exist which under the Interstate Commerce Act justifies the exercise of such power.

The second question hereinbefore stated is whether Congress by its amendment of Section 13 of the Interstate Commerce Act by the Transportation Act of 1920, intended to vest in the Interstate Commerce Commission authority to regulate intrastate rates on intrastate railroads, in case such rates should be found unduly discriminatory as respects interstate commerce. Section 1 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, provides in part as follows:

> "(1) That the provisions of this Act shall apply to common carriers engaged in—
>
> "(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a com-

mon control, management, or arrangement for a continuous carriage or shipment.

* * * * * * * *

"(2) The provisions of this Act shall also apply to such transportation of passengers and property * * * but only in so far as such transportation * * * takes place within the United States, but shall not apply —

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid."

It has been held that carriers operating wholly within the limits of one state become, if they engage in carrying merchandise consigned from a point in one state to a point in another, instruments of interstate commerce and so are subject to Federal regulations so far as concerns the interstate commerce in which they thus engage (*The Daniel Ball*, 10 Wall. 557; *Norfolk & Western R. R. Co* v. *Pennsylvania*, 136 U. S. 114; *Cin., N. O. & Texas Pac. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184). But that is far from holding that as to their purely intrastate business, where that can be separated from interstate business, such carriers are subject to Federal control. In the case of the defendants here there is no difficulty, so far as passenger traffic and transportation of milk and cream are concerned, in separating intrastate from interstate business.

In view of the provision above quoted excluding intrastate transportation from the operation of the Interstate Commerce Act, I think it would be indulging in too violent a presumption to hold that Congress intended by the two paragraphs added to Section 13, to authorize the Interstate Commerce Commission to fix intrastate rates on intrastate roads, even if it should find such roads discriminating as regards interstate commerce and persons or localities engaged therein.

This brings me finally to the discussion of the first and most important of the three questions, namely, as to the power of Congress to regulate or fix, either directly or through the Interstate Commerce Commission, intrastate rates on intrastate roads. To grant that Congress has this power is to enable the Federal government to take away, as already stated, all the authority of the States over the railroad lines within their limits, for what railroad can be found which does not at times engage in the transportation of persons or goods in interstate commerce?

This is a subject of far greater import than the question whether railroads should or should not be permitted to increase their rates of fare. It involves the question of the sovereignty of the states. It is a fundamental question upon which the whole fabric of our government rests. As such, is should never be lost sight of by the people and certainly not by the courts. I shall, therefore, claim the privilege here and now of calling attention though the effort may be futile, to a few of the underlying principles upon which this Republic was founded and upon which this sovereignty depends. I may say, at the outset, that, by the Constitution of the United States, Article VI, it is provided that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

This provision very plainly states that it is not the laws of the United States but the laws of the United States *which shall be made in pursuance of the constitution*, that bind the judges in every state, hence, it is clear that the judges in the several states have the right

to inquire whether any law of the United States is or is not constitutional exercise of the law-making power; and to pass upon that question, subject to review of their decisions by the Supreme Court of the United States, whose power extends to all cases in law or equity, arising under under the Constitution. The Constitution was adopted at a convention, composed of the deputies from twelve of the original states, on September 17, 1787, and, at the same convention, a desire was expressed by the representatives of a number of the states adopting the Constitution,

> "in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and, as extending the ground of public confidence in the government, will best insure the beneficent ends of its institution."

Accordingly, ten articles of amendment were adopted at the first session of the first Congress, held on March 4, 1789. It was said in *Matter of Spies* (123 U. S. 181):

> "That the first ten articles of the amendment were not intended to limit the powers of the state government in respect to their own people, but to oprate on the national government alone was decided more than a half century ago, and that decision has been steadily adhered to since."

Article X of these amendments reads as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people."

Article IX provides that:

> "The enumeration in the Constitution, of certain

rights, shall not be construed to deny or disparage others retained by the people."

If the original form of our government had been other than it was, the need of these provisions would not have arisen. If only one great State had been formed by the amalgamation of the thirteen original states, when they found that the Articles of Confederation which had bound them in their struggle for independence were too loose and inadequate to the uses and protection of a nation opposed to sovereign states, perhaps the machinery of government might have been simplified, but such a plan could not have been adopted. Every one who is familiar with the history of our government knows that the Constitution was not adopted without controversy, doubt, jealousy and suspicion on the part of the many people in the different states. So much opposition was, indeed, shown to the proposition of the new Federal Constitution in our own State that two of our deputies, Lansing and Yates, withdrew from the convention, leaving Alexander Hamilton alone to represent this State in the convention, and later the opposition almost defeated the ratification by New York, it only being adopted by a majority of three votes out of a total of fifty-seven in the State convention on ratification.

Under this Constitution, the powers of government over all the States were vested in the general or Federal Government; and, at the same time, the powers of government over each State, in so far as they were not delegated either expressly or by necessary implication to the Federal government were reserved to the States themselves. In a word, there was thus created a nation comprising in one union a central state and as many separate states as then existed or have been created since. The result of this dual form of government is that each citizen of the country owes a double allegiance, first to the Federal government and then to the government of the State where he resides. This dual government, or *imperium in imperio*, claiming double

allegiance, although its detractors have spoken of it as an anomaly, is not logically incompatible, although at times it has frequently presented complex questions of control. In the working out of this hitherto untried form or theory of government during the past century and a third that have elapsed since its adoption, efforts have been made on the one hand to increase the Federal power and on the other to strengthen the power of the States. These attempts have never succeeded to any extent that threatened the fabric of our government. But, in the last few years, owing, perhaps, to the influx into our land of vast numbers of aliens without knowledge of or interest in our institutions; or owing to a dangerous tendency on the part of our higher officials to disregard constitutional limitations upon autocratic power; or owing to a growing indifference on their part to the constitutional balancing of power between the Executive and Legislative branches of our government; or owing to unusual conditions of administration resulting from the World War, or to other influences, some of which might easily be suggested, there seems now to be a danger that State sovereignty will be forgotten or lost in an enlarged but unconstitutional expansion of Federal control and power over matters which are clearly within the limits of State jurisdiction. If such a condition shall ever be brought about, our entire system of constitutional government will be at an end, and, upon the ruins of our States there will arise a centralized power which must inevitably merge either into absolutism on the one hand or into anarchy on the other, and the magnificent example and spectacle of a government of the people, by the people and for the people will perish from the earth.

To return, therefore, to the question which has been suggested whether the Congress has the right to confer upon an administrative and upon the judicial branch of the Federal Government, power to control rates of fare of transportation companies operating within the State which has given it a charter, I believe that the question must be answered in the negative. Otherwise,

what becomes of state sovereignty! If the Congress can control intra-state railroad rates, why may it not also control and regulate rates to be charged for all public utilities or public commodities or by all corporations or individuals engaged in business which affects public interests, through the fiction that it affects interstate commerce—such for example, as coal, petroleum, gas, electric light, the telegraph and telephone! If it can regulate the price of these commodities, why may it not regulate the price of the labor which produces them or the various trades or manufactures which make use of them! Can it, in other words, regulate and control every kind of business, corporate or private, carried on in each of the States! If the general government can by means of congressional or executive agencies regulate and control all commerce, both interstate and intrastate, must it stop there! Can it regulate all the relations of life, including those of husband and wife, parent and child, master and servant, landlord and tenant, by making general laws supereeding the statutes of the several states! Where shall the line be drawn, or is there no line! In times of war doubtless it may do many of these things which would be extra constitutional in times of peace. Is the Constitution a vital force for the conservation of the general good, or is it a discarded relic of other days in our Republic, when law was not a purchasable commodity, either in legislative halls or in the courts of justice!

It is to be hoped that these questions, so vital to the welfare of our people, so serious in their consequences to our national existence, so threatening in their portent to our states, may not be allowed to go unanswered by those who, under our Constitution, are charged with the high duty and privilege of representing the people of this nation in their executive and legislative departments.

Nearly 100 years ago, Governor DeWitt Clinton, in an annual message to the Legislature, speaking of an attempt on the part of the Federal government to require boats navigating the canals within the State to be

enrolled and licensed and to pay tonnage duties under the statutes regulating the coasting trade of the United States, spoke as follows:

> "The considerations which grow out of this occasion, and the complaints which have been made in different states about alleged encroachments of the national government on their constitutional powers, point to the most formidable dangers that can menace the stability of the Union and the welfare of our country. Without a general government, we shall neither have union at home nor respect abroad. We shall be arrayed into separate confederacies, or exist as insulated states, maintaining large standing armies, wasting our resources in intestine wars, the dupes of foreign intrigues and the victims of civil discord. Without state authorities, there can be no civil liberty and no good government; for it is utterly impossible that so extensive a country can be bound together unless as a confederation or a military despotism. Every true friend of America will strive to maintain these respective authorities in full purity and vigor, without detracting from the powers of the one to add to those of the other, nor extending the faculties of either beyond their legitimate dimensions. Each possesses a portion of the delegated authority of the people, and each is supreme within the sphere of its constitutional powers. The apprehensions entertained by some of our distinguished statesmen at the formation of the national constitution, have entirely failed; and instead of the predominance of a controlling power in the States, the centripedal force of the general government has had perhaps too great a preponderance." (See Message of the Governors, Vol III, p. 78.)

If anything were needed to add to the force of this statement, it may be found in the noteworthy address of United States Senator Charles S. Thomas, of Colo-

rado, delivered before the State Bar Association of New York on January 16, 1920, and published in its annual report, at page 391 *et seq.*

It would be presumptuous in me to attempt any elaborate defense of our institutions. Abler pens than mine have dealt with the subject in language that will forever perpetuate the motives, the ideals and the sacrifices of the men who founded this Republic. Perhaps I ought humbly confine my words to the interpretation of law, as Lord Bacon wrote that judges should, but in what I have been saying, my purpose was not otherwise than to call attention to the dangers that lie in the pathway in which we seem to be traveling, a pathway which must lead to an end where our union, our justice, our domestic tranquillity and the blessings of liberty that the Constitution endeavored to perpetuate will be more and where the words "The *United States* of America" will have lost their true significance.

Motion for injunction *pendente lite is granted* with ten dollars costs to the plaintiff. Settle order on notice.

J. S. C.

Office Supreme Court, U. S.
FILED
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WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 206.

RAILROAD COMMISSION OF WISCONSIN, ET AL.,
Appellants,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

BRIEF *AMICUS CURIAE* ON BEHALF OF THE STATE OF NORTH DAKOTA.

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BRIEF *AMICUS CURIAE* ON BEHALF OF THE STATE OF NORTH DAKOTA.

This Honorable Court by order entered from the bench on November 14th, 1921, granted leave to the State of North Dakota to file a brief *amicus curiae* herein with the understanding that a like right is granted the defendants to the suit pending in this Court upon Original Bill brought by the State of North Dakota, designated as No. 25 original, Wm. Lemke, *ex rel*, Attorney General v. Chicago & Northwestern

Ry. Co., *et al.* This brief is filed on behalf of the State of North Dakota pursuant to the authority as noted.

STATEMENT.

The State of North Dakota is interested in this, the Wisconsin case, because its rates, like the intrastate rates of Wisconsin, have been increased by order of the Interstate Commerce Commission. There is this difference, however, between this case and the North Dakota case, viz: Whereas in the Wisconsin case, the Interstate Commerce Commission has ordered only the increase in intrastate passenger fares, in the North Dakota case, not only have intrastate passenger fares been ordered increased, but all intrastate freight rates and charges of every description, as well.

It is not proposed to argue the North Dakota case on its merits in this brief. A recital of what has transpired in the North Dakota case, is, nevertheless, we believe, in order.

The order of the Interstate Commerce Commission directing the increasing of the North Dakota intrastate rates, fares and charges was announced at 4 P.M. May 9, 1921. This Court was in adjournment at the time during a recess and did not convene until May 16th, at which session a motion was made on behalf of the State of North Dakota for leave to file an Original Bill to enjoin the railroads serving North Dakota from putting the Commission's order into force. The order by its terms was not to become effective until June 10, 1921. At this same session of this Court, the defendants named in the Bill made a motion for leave to file objections to the filing of the Original Bill.

In the meantime and on May 10th, the day following the announcement of the Commission's order, the carriers parties thereto filed a petition with the United States District Court for the District of North Dakota seeking to enjoin the responsible officers of the State from enforcing the intrastate rates, fares and charges. The motion for a temporary restraining order was heard before three judges at Minneapolis on May 18th, who granted the temporary injunction. On May 31st, the next session of this Court following its session on May 16th, this Court entered an order permitting the Original Bill and certain amendments to be filed.

A motion was thereupon presented to District Judge Amidon for a hearing of the injunction suit on its merits. This motion was denied because this Court had allowed the Original Bill to be filed and Judge Amidon felt that nothing further should be done in that suit pending the disposal by this Court of the issues raised upon the Original Bill. A motion to dismiss the Original Bill has been made based upon a single contention which was in identical terms presented to this Court as one of the objections to the filing of the Original Bill. The North Dakota case stands set for oral argument on January 3, on this motion to dismiss.

One further remark, this case, the Wisconsin case, like all the other pending intrastate rate cases, comes before this Court simply upon the Commission's findings with no record of facts from which this Court can determine whether the Commission's findings are supported in fact. In the North Dakota case the Court will be presented with a record of the evidence before the Commission that will show wherein the Commission's findings are unsupported in fact.

This brief has had to be written for the most part while counsel was traveling on trains and consequently without access to his library. The propositions of law laid down are so fundamental and the cases supporting same so well known to this Court that it is hoped the failure to make voluminous citation of authorities will not be regarded as an omission.

The argument in this brief will be addressed solely to questions of fundamental power.

ARGUMENT.

I.

THE POWER WHICH THE COMMISSION MAY EXERCISE UNDER SECTION 13, PARAGRAPH 4 OF THE INTERSTATE COMMERCE ACT IS NO GREATER THAN THE POWER AS ANNOUNCED BY THIS COURT IN THE SHREVEPORT CASE, HOUSTON, EAST AND WEST TEXAS RAILROAD CO. v. U. S., 234 U. S., 342.

As the Court knows, in the Shreveport Case, 234 U. S., 342, it held that Congress had the power to prevent injurious discriminations against interstate commerce brought about by particular intrastate rates, and that when the rates for the interstate commerce are found by the Commission to be reasonable, the carriers are free to comply with an order requiring the removal of such discrimination by increasing the particular state rates causing the undue burden upon interstate commerce.

The Transportation Act of 1920 (41 Statutes at Large 456) amended the Act to Regulate Commerce as it read when the Shreveport Case was decided, viz:

June 8, 1914. The particular amendment is embodied in Section 13, paragraph 4, which is as follows:

> "(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

That this provision was simply intended as a substantive expression of the Shreveport Doctrine as announced by this Court in the Shreveport Case, is shown by the statement of Senator Cummins, chairman of the Senate Interstate Commerce Committee in reporting the Transportation Act to the Senate, reported in Congressional Record, Vol. 59, Part 1, pages 142-3, he said:

> "Most of you I am sure are familiar with what is known as the Shreveport decision. * * * This Committee has attempted to simply express the decisions of the Supreme Court of the United

States. We have not attempted to carry the authority of Congress beyond the exact point ruled by the Supreme Court in the cases to which I referred. (Shreveport Case, Minnesota Rate Case, Illinois Passenger Fare Case.)''

The Commission in making these orders increasing intrastate rates, fares and charges has acted pursuant to its new powers conferred by this new provision of the Act, but that provision according to the mouth piece of Congress, is not intended to go beyond the doctrine announced by this Court in the Shreveport Case.

II.

THE SHREVEPORT DOCTRINE APPLIES ONLY TO SPECIFIC INSTANCES OF DISCRIMINATION BROUGHT ABOUT BY PARTICULAR INTRASTATE RATES AS DISTINGUISHED FROM THE WHOLE BODY OF STATE RATES, FARES AND CHARGES.

In the Shreveport Case, only certain specific, isolated state rates were involved. The doctrine as announced in that case can have application, therefore, only to similar situations and not to cases where the whole body of state rates, fares and charges is involved. To hold that the same doctrine applies would be to extend it to an untenable position as will be shown.

This was the situation in the Shreveport Case. Shreveport, La., 40 miles from the Louisiana-Texas border, is 231 miles from Houston Texas, and 189 miles from Dallas, Texas. The intrastate rates from Houston and Dallas to Texas points intermediate to Shreveport were prescribed by the Texas Railroad Commission and were lower for similar distances than the in-

terstate rates applying from Shreveport to these intermediate Texas points. This disparity was found by the Interstate Commerce Commission to be an undue prejudice against Shreveport and also that the interstate rates from Shreveport were reasonable *per se*. Only two short lines in Texas were involved, including only 191 miles of Texas track to Houston and only 149 miles of track in Texas to Dallas. The situation was distinctly a small, isolated, local condition which at once distinguishes itself from a case where every mile of track in the state and every state rate, fare and charge is involved.

The Shreveport Doctrine as announced in the Shreveport Case is necessarily part and parcel of the situation involved in that case, and necessarily that doctrine must apply and until extended by interpretation by this Court can only apply to isolated local situations similar to the Shreveport situation as described.

If by the Transportation Act it was intended not to go beyond the Shreveport decision, certainly the power of the Commission under Section 13, paragraph 4, cannot extend to situations other than the isolated, local situations similar to that involved in the Shreveport Case as distinguished from the whole body of intrastate rates, fares and charges applying on every mile of track within the state.

III.

TO HOLD THAT THE SHREVEPORT DOCTRINE APPLIES TO THE WHOLE BODY OF STATE RATES, FARES AND CHARGES TO THE SAME EXTENT AS ANNOUNCED WITH RESPECT TO PARTICULAR LOCAL AND SEGREGATED STATE RATES, WOULD NECESSARILY BE TANTAMOUNT TO HOLDING THAT THERE IS NO RESERVE POWER IN THE STATES TO REGULATE TRANSPORTATION WITHIN THEIR RESPECTIVE BORDERS.

The Shreveport Doctrine as applied in the Shreveport Case did not oust the power of Texas to regulate all other rates applying to intrastate transportation. The Shreveport Doctrine as announced recognizes that there is necessarily a reserved power in the States over purely intrastate transportation.

If it be construed that the Commission has the same power over the whole body of intrastate rates, fares and charges that it may have over isolated state rates, such a power necessarily implies that there is no reserved power in the States to regulate rates for intrastate transportation.

Of course, this Court in this case will recognize as it has recognized in every prior case involving the commerce clause of the Federal Constitution, that the power of the Federal Government under that clause is a delegated power. Each state delegated a part of its sovereign power to make up the composite sovereignty. This Court has always recognized in every such case, that the States in creating the composite sovereignty delegated only so much of its sovereign power over the particular subject-matter as was necessary to the ac-

complishment of the composite prerogative, reserving to itself all sovereignty not so delegated.

In all previous cases not excepting even the Shreveport Case, this Court has uniformly recognized that the sovereign States in creating the composite authority over interstate commerce did not delegate their entire sovereignty over their intrastate rates, fares and charges. Some sovereignty over their rates, fares and charges must, therefore, have, necessarily, been reserved by the several States.

By reference to pages 50 and 51 of the Transcript of Record, the Court will observe that the order of the Commission requires all the carriers serving Wisconsin

> "to establish, put in force, and maintain passenger fares and excess-baggage charges for the transportation of passengers and their baggage in intrastate commerce within the State of Wisconsin,"

which shall be increased by the same percentage, viz: 20 per cent as was made applicable in interstate fares and charges by *Ex Parte* 74.

The next paragraph of the order provides that these 20 per cent increased fares and charges shall become effective January 15, 1921,

> "and remain in force until the further order of the Commission."

This order fixed every passenger fare and excess-baggage charge applicable within the State of Wisconsin, and the fares and charges as established remain in force until changed by the Commission.

If this order is sustained certainly the State of Wisconsin cannot change a single passenger fare or excess-

baggage charge applicable in the State. The authority of the State over its passenger fares and excess-baggage charges could be no more completely ousted than it is by this order, if sustained.

The only way particular intrastate passenger fares could be thereafter changed, if the order is valid, would be by the Interstate Commerce Commission, yet that Commission is specifically limited in its jurisdiction over particular rates, fares and charges to interstate rates, fares and charges, and it is not possible for it to entertain a complaint concerning the prejudicial character, for instance, of a particular Wisconsin intrastate passenger fare in its relation to other Wisconsin intrastate passenger fares.

Certainly the Wisconsin Railroad Commission could not require such undue prejudice in its intrastate passenger fares to be removed, if this order is held valid, because to remove the undue prejudice the fares would have to be changed. The order, however, specified, as the Commission has the power to do under Section 15, paragraph 2 of the Interstate Commerce Act (41 Statutes at Large 474), that the fares and charges as fixed in the order shall not be changed until its further order.

Of course the order in the Wisconsin case applies only to passenger fares and excess-baggage charges. It might be said, therefore, that the complete reserved authority of the State has not been ousted, but if the power is recognized as to intrastate passenger fares it must attach with equal force to all intrastate rates, fares and charges. In fact, as will appear from an examination of the order of the Commission in the North Dakota Case which appears as a part of Exhibit B to the Original Bill in No. 25 original, the Commission in that case fixed not only passenger fares and excess-

baggage charges, but the surcharge on Pullman transportation and all freight rates operating intrastate within North Dakota. So that while in the Wisconsin Case, the reserved authority of the State is ousted only as to passenger fares and excess-baggage charges, in the North Dakota Case, all of the reserved power of North Dakota over all intrastate rates, fares and charges is ousted, if the Commission's order is sustained. The State of North Dakota is impotent as long as the Commission's order is sustained, to regulate a single rate, fare or charge applicable solely upon intrastate transportation within the State.

If a reserved power in the State to regulate the rates, fares and charges applicable upon intrastate transportation has always been recognized, how can this reserved power of the State be taken away by an Act of Congress or by an interpretation by this Honorable Court?

This reserved power of the States is subject to a Constitutional limitation, viz: that in exercising the power to regulate intrastate fares, rates and charges they shall not be made so low as to deprive the carriers operating in the particular State of its property without due process of law.

If the State rates, fares and charges come within this Constitutional limitation and are not confiscatory, then there can be no warrant for the existence by interpretation of a Federal power that in practice usurps the reserved power of the States which has always been heretofore admitted to exist.

IV.

THE FEDERAL POWER TO PROTECT INTERSTATE COMMERCE CANNOT BE EXERCISED OVER THE WHOLE BODY OF STATE RATES, FARES AND CHARGES UNTIL IT IS MADE TO APPEAR THAT THE STATE RATES, FARES AND CHARGES ARE CONFISCATORY.

The Shreveport Doctrine as announced in the Shreveport Case, is predicated upon the postulate that the Constitutional authority to regulate interstate commerce presumes an authority in Congress to preserve intact the thing to be regulated, to quote from the decision:

> "Its (Congress) authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek this attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard, or destroy it."

Manifestly the extraneous use made of the interstate carrier, as its operation in intrastate commerce, must threaten to cripple, retard or destroy it as an interstate carrier before the Federal power attaches. Or stated differently, the Federal power attaches only to remove undue burdens upon interstate commerce.

As has been exhaustively argued by distinguished counsel in this case, Section 13, paragraph 4 as originally drafted contained the specific phrase "undue burden" for which was substituted the phrase as the Act now appears, "unjust discrimination."

The only way that the whole body of State rates, fares and charges can produce an "unjust discrimination" against or become an "undue burden" upon, interstate commerce, is for such body of rates, fares and charges as a whole, to be confiscatory. Considered as a whole, if the body of rates, fares and charges as related to the carrier property employed within the State is reasonably compensatory, certainly such State rates, fares and charges as a whole, cannot create any "unjust discrimination" against or any "undue burden" upon interstate commerce.

The Commission in the Wisconsin Case, nor in any of the other intrastate rate cases, did not make any attempt to determine whether the existing body of intrastate rates, fares and charges taken as a whole was reasonably compensatory as related to the value of carrier property within the State.

Since the Commission has made no inquiry to determine whether the Wisconsin rates, fares and charges as applying at the time were confiscatory, it can but result that its finding that there is unjust discrimination against interstate commerce produced by the level of the whole body of intrastate passenger fares, is without foundation in fact and, therefore, void and that its order increasing the intrastate passenger fares is likewise void.

V.

THE ORDER OF THE COMMISSION IN THE WISCONSIN CASE AND IN ANY OTHER CASES INVOLVING PASSENGER FARES WITHIN ANY STATE LOCATED IN WESTERN GROUP IS ABSOLUTELY VOID BECAUSE THE COMMISSION IN FIXING AND INCREASING THE INTERSTATE RATES, FARES AND CHARGES IN *EX PARTE* 74, FAILED TO COMPLY WITH THE LAW AND DID NOT FIX THE VALUE OF CARRIER PROPERTY IN WESTERN GROUP.

The disparity in all of these intrastate rate cases is a difference in interstate and intrastate rates, fares and charges which was brought about not by any action of the States in reducing their intrastate rates, fares and charges but by the action of the Interstate Commerce Commission in increasing interstate rates, fares and charges.

If the Commission in increasing the interstate passenger fares, for instance, acted without warrant in law, the disparity between inter and intrastate passenger fares brought about by so illegally increasing the interstate passenger fares, certainly cannot furnish a legal basis for the exercise of its power to order the removal of the disparity, granting that its power to remove the disparity, is not otherwise questioned.

The interstate rates, fares and charges were increased pursuant to an investigation the report on which by the Commission is designated as *Ex Parte* 74. The report in *Ex Parte* 74 appears in full in the Transcript of Record at pages 56 to 94, inclusive.

The authority of the Commission to increase interstate rates, fares and charges is contained in Section

15-a of the Interstate Commerce Act which is in pertinent part as follows:

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, * * * earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carrier held for and used in the service of transportation."

In *Ex Parte* 74 the Commission divided the country into four "rate groups or territories." These groups were designated as Eastern, Southern, Western and Mountain-Pacific groups. Eastern group, roughly speaking, included all territory east of the Mississippi River and north of the Ohio River; Southern group included all territory south of the Ohio River and east of the Mississippi River; Western group included that territory lying west of the Mississippi extending to a line following the boundary line between North Dakota and Montana and the boundary line between South Dakota and Wyoming and Nebraska and Wyoming to the line of the Union Pacific extending east from Cheyenne, Wyoming, then following the line of the Union Pacific westward to Cheyenne and from Cheyenne running southward through Denver, Colorado Springs, Pueblo and Trinidad, Colorado, then following the line of the Atchison, Topeka & Santa Fe Railway to El Paso, Texas; Mountain-Pacific group includes the territory west of the line just defined, to the Pacific Ocean.

The first infirmity in its action in increasing the interstate rates, fares and charges comes about from the fact that the Commission did not comply with the law, in that it divided the country into four rate groups and prescribed a different percentage of increase for Western, viz: 35 per cent, than that it prescribed for Mountain-Pacific group, viz: 25 per cent, without first fixing the value of carrier property as a whole for Western group as distinguished from the value of carrier property as a whole for Mountain-Pacific group. Having failed to find the respective values for these two groups, how could the Commission have any legal basis for making a difference in the percentage of increase in the two groups?

Before the Commission can, under paragraph (2) of Section 15-a, increase interstate rates for a particular rate group, it must base such increase upon the return yielded upon the fair value of the carrier property in the group. The fixing of the aggregate value of carrier property for the group as a whole becomes a condition precedent to the fixing of the percentages. That the requirements of the Act as conditions precedent to its legal action must be observed by the Commission before its action can be valid, is fundamental and is supported by previous decisions of this Court.

Wisconsin and North Dakota are located within Western group in which the Commission, although it failed to find what the value of carrier property in that group was, nevertheless, ordered interstate freight rates increased 35 per cent and passenger fares increased 20 per cent.

This failure of the Commission to find the value of carrier property for Western group and Mountain-Pacific group was due to a complete lack of evidence in

the record in *Ex Parte* 74 to support such findings of value inasmuch as the carriers presented the case upon the theory that all territory west of the Mississippi River would be included in a single group.

This failure of the Commission to observe the requirements of the law is vital to the validity of the interstate rates and fares which were used as the basis in judging the disparity between interstate and intrastate rates and fares. If the interstate rates and fares were illegal there is no legal basis for finding that the intrastate rates or fares are too low and should be increased and the Commission's orders increasing intrastate rates and fares in the Wisconsin Case and in cases involving other States in Western group are accordingly invalid and void.

VI.

THE ORDER OF THE COMMISSION IN THE WISCONSIN CASE AND IN ANY OTHER CASES INVOLVING PASSENGER FARES WITHIN ANY STATE LOCATED IN WESTERN GROUP IS VOID BECAUSE THERE WAS NO WARRANT IN FACT FOR INCREASING INTERSTATE PASSENGER FARES IN *EX PARTE* 74 IN WESTERN GROUP WHEN FREIGHT RATES IN THAT GROUP WERE INCREASED 35 PER CENT.

The Commission found that the value of carrier property as a whole for all carriers west of the Mississippi River was $8,100,000,000. (Transcript of Record, page 65.)

If these carriers were to have a 6 per cent return upon that value it would be necessary for them to have a net railway operating income of $486,000,000. As

shown at page 72, Transcript of Record, these carriers had an actual net railway operating income for the test year of only $293,212,870. In order, therefore, to bring the net revenues up to a 6 per cent basis an increase of the difference between $486,000,000 and $293,212,870 or $192,787,130 would be necessary. A wage increase was made while the Commission was considering *Ex Parte* 74 and it was estimated that to meet this increase in this territory $234,840,000 (Transcript of Record, page 74) increase in revenue would be required. So that the total additional revenue required to net 6 per cent and pay the additional wage bill was $192,787,130, plus $234,840,000 or $427,627,120.

Now the total freight revenues on which the actual net railway operating income as used herein, was derived, was $1,475,695,163 as shown by Wettling's Exhibit No. 1 filed in *Ex Parte* 74. The required additional revenue of $427,627,120 is only 28.9 per cent of $1,475,695,163.

In other words, the entire additional revenue required would have been secured by increasing the freight rates only 28.9 per cent. Instead of this, the Commission increased freight rate in Western group 35 per cent and in Mountain-Pacific group 25 per cent or an average for the two groups composing this western territory of 30 per cent.

This average increase of 30 per cent being more than 28.9 per cent necessarily yielded the carriers more revenue than was needed to earn 6 per cent upon the value of carrier property west of the Mississippi River so there can be no justification even upon the face of the report in *Ex Parte* 74 for having increased interstate passenger fares at all.

If the interstate passenger fares were increased by the Commission without justification therefor in fact, as has been shown, how can the disparity between interstate and intrastate passenger fare brought about by such unwarranted increase in the interstate fares produce an undue burden upon interstate commerce or an unjust discrimination against interstate commerce?

CONCLUSION.

Section 13, paragraph 4 is no more nor no less than the substantive expression of the Shreveport Doctrine as announced in the Shreveport Case.

Any attempt to extend the Shreveport Doctrine to cover the whole body of intrastate rates, fares and charges can only result in the complete ousting of the reserved powers of the States to regulate their intrastate rates, fares and charges.

The Federal power with respect to the whole body of intrastate rates, fares and charges attaches only to the extent of determining whether such body of rates, fares and charges as a whole is confiscatory.

The determination of the confiscatory nature of rates being a judicial function, cannot be delegated by Congress to a quasi-legislative body like the Interstate Commerce Commission. The attempt of the Commission to exercise a power tantamount to determining whether the whole level of state rates is confiscatory, is, consequently, an unconstitutional exercise of judicial authority.

The Commission's order increasing interstate passenger fares cannot be justified in either law or fact and, therefore, the difference between inter and intrastate passenger fares brought about by such unjusti-

increase cannot be an undue burden upon or unfiabldiscrimination against interstate commerce.
just order of the Interstate Commerce Commission
Timing to increase intrastate rates, fares or
prices cannot, therefore, be valid and should be set
charges null and void and of no effect.
aside

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1920

No. 206

RAILROAD COMMISSION OF WISCONSIN, and CARL D. JACKSON, H. R. TRUMBOWER and JOHN S. ALLEN, as members of and constituting the Railroad Commission of Wisconsin; JOHN J. BLAINE, individually and as Attorney General of the State of Wisconsin; FRANK C. MEYER, individually and as District Attorney of Grant County, State of Wisconsin,

Appellants,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Appellee.

} In Equity

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLANTS

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[illegible] PRINTING CO., MADISON, WIS.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1920

No. 694

RAILROAD COMMISSION OF WISCONSIN, and CARL D. JACKSON, H. R. TRUMBOWER and JOHN S. ALLEN, as members of and constituting the Railroad Commission of Wisconsin; JOHN J. BLAINE, individually and as Attorney General of the State of Wisconsin; FRANK C. MEYER, individually and as District Attorney of Grant County, State of Wisconsin,

Appellants,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Appellee.

In Equity

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

BRIEF OF APPELLANTS

STATEMENT OF CASE

This is an appeal from an order for an interlocutory injunction, made by the District Court of the United

States for the Eastern District of Wisconsin after a hearing before three judges on December 11, 1920. Application therefor was made in a bill in equity filed by the railroad to restrain the officers of the State of Wisconsin from interference with the collection of certain increased rates, fares, and charges for the carriage of passengers in the purely internal commerce of Wisconsin, directed to be put in force by an order in form made by the Interstate Commerce Commission under date of November 27, 1920.[1]

By a prior order,[2] that body had authorized an increase of 20 per cent in passenger fares and charges, excess baggage charges, and also a sur-charge upon passengers in sleeping and parlor cars amounting to 50 per cent of the charges therefor, to accrue to the rail carriers, by all steam railroads subject to its jurisdiction, in a rate group established by it, including the State of Wisconsin. Pursuant thereto, such increased rates, fares, and charges were established in interstate commerce throughout the group becoming effective August 26, 1920.[3] While the proceedings which resulted in the order last referred to were pending, the railroad, with other carriers, made application to the Railroad Commission of Wisconsin for authority to make increases in intrastate traffic corresponding with those that might be granted for interstate business by the Interstate Commerce Commission. The Wisconsin Commission denied the application, upon the sole ground that jurisdiction

[1] Interstate Commerce Commission, No. 11763, Wisconsin Passenger Fares, 59 I. C. C. 391; R. p. 11.

[2] Ex Parte 74, *Increased Rates, 1920*, 58 I. C. C. 220, R. p. 56.

[3] R. p. 1, 15.

over the subject matter of passenger fares had been taken from it by the enactment of section 1798*a*, Wisconsin Statutes—The Wisconsin Two Cent Fare Law. Following such denial of jurisdiction, the carriers filed a petition, later amended, for relief under the provisions of section 13 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, section 416.[1] The Interstate Commerce Commission, upon its own motion, instituted a proceeding pursuant to the terms of this section.[2] At the conclusion of such investigation, it made its report or findings, which will be considered in detail in the body of the argument. Its formal conclusions thereon may be condensed as follows:

That the interstate fares established by its order, Ex Parte 74, were reasonable;

That the failure to establish the same fares for intrastate commerce in Wisconsin "has resulted and will result"—

(a) "In intrastate fares and charges lower than the corresponding interstate fares and charges;"

[1] R. p. 15, 59 I. C. C. 392.

[2] Such investigation being, as stated by the Commission, "to determine whether the rates, fares and charges required by authority of the state of Wisconsin to be maintained by said railroads, cause, or will cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce; and as to what rates, fares and charges, if any, or what maximum or minimum or maximum and minimum, shall be prescribed to be charged by the petitioners, in order to remove such advantage, preference, prejudice, or discrimination, if any, as may be found to exist." (59 I. C. C., 391, 393; R. p. 16.)

(b) "In undue prejudice to persons traveling in interstate commerce within the state of Wisconsin and between points in the state of Wisconsin and points in other states; in undue preference of and advantage to persons traveling intrastate in Wisconsin;" and

(c) "In unjust discrimination against interstate commerce."[6]

It was further found that such prejudice, preference, and unjust discrimination could and should be removed by bringing intrastate to the level of interstate passenger rates, fares, and charges.

The order entered upon such report referred to and made the same a part thereof, and by its terms the carriers were—

"notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination *found in said report to exist.*"[7]

by increasing Wisconsin intrastate fares to correspond with the fares fixed for interstate transportation.

In addition to the foregoing, the bill contained formal allegations that the Wisconsin Two Cent Fare Law, and other laws of the State, were unconstitutional, because in violation of the Fourteenth Amendment.

Appellants moved to dismiss the bill of complaint for want of equity manifest upon the face thereof. This motion is still pending and undetermined.

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[6]59 I. C. C. 391, 396; R. p. 18.
[7]R. p. 51.

SPECIFICATION OF ERRORS RELIED UPON

The court erred in granting the motion for an interlocutory injunction as prayed for, because the bill of complaint stated no cause of action.

I. The order of the Interstate Commerce Commission, under which the disputed rates are sought to be kept in force, is void.

A. So far as it purports to displace all state rates on the ground that mere difference in rate level causes "any undue, unreasonable or unjust discrimination against interstate or foreign commerce," it is in excess of jurisdiction, and an abuse of power.

B. Assuming that power was given to bring an entire schedule of state rates up to the level of interstate rates, because of "revenue discrimination," jurisdiction was improperly and prematurely exercised in the present case.

C. So far as the order purports to remove prejudice and discrimination against persons or localities, "it has no definite field of operation and leaves uncertain the territory and points to which it applies."

II. The bill of complaint wholly fails to make a *prima facie* showing as to the invalidity of the Wisconsin statutes.

ARGUMENT

I.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION, UNDER WHICH THE DISPUTED RATES ARE SOUGHT TO BE KEPT IN FORCE, IS VOID.

A. So far as the order of the Commission purports to displace all state rates on the ground that mere difference in rate level causes "any undue, unreasonable or unjust discrimination against interstate or foreign commerce," it is in excess of jurisdiction and an abuse of power, because Congress has not asserted a unified control over all commerce and delegated the exercise thereof to the Commission.

1. The issue stated: Has Congress authorized unified control over commerce?

The Interstate Commerce Commission made an order fixing all rates for Wisconsin intrastate passenger transportation by interstate carriers. "The contention is that the Commission has exceeded its statutory powers; and that hence the order is void."

Skinner & Eddy Corporation v. U. S., 249 U. S. 557, 563.
U. S. v. Penn R. Co., 242 U. S. 208.
So. Pac. Co. v. Int. Com. Comm., 219 U. S. 433.
Mfrs. Ry. Co. v. U. S., 246 U. S. 457, 481.
Tex. & Pac. Ry. Co. v. I. C. C., 162 U. S. 197, 210.

The challenged exercise of jurisdiction was preceded by the designation of a rate group, including Wisconsin, and the establishment therein of rates in interstate commerce ostensibly pursuant to the direction of section 15a of the Interstate Commerce Act. It is argued that failure to place Wisconsin rates for purely intrastate traffic upon the same basis as the group rates for interstate commerce lessens the amount of revenue received by the carriers,

and renders unavoidable an increase of rates upon interstate traffic, in order to recoup the deficit and insure "a fair return upon the aggregate value of the railway property," as prescribed, thereby burdening and causing an unjust discrimination against interstate commerce, which it becomes the duty of the Commission to remove, by virtue of the provisions of paragraphs (3) and (4) of section 13. The Commission's order is thus wholly without foundation, unless the existence of a general level of rates for the movement of commerce within a state lower than the rate for such movement into and out of the state constitutes "undue, unreasonable, or unjust discrimination against interstate or foreign commerce."

The central and controlling consideration that led to the entry of the order whose validity is here drawn in question was deficiency in revenue to be derived from intrastate commerce unless the higher rates established for interstate commerce were put in force. The proceedings have popularly been referred to as "revenue proceedings." As stated by representatives of the carriers, their purpose was "to get the money." There will be no serious dispute upon this proposition, but were it questioned, its truth becomes apparent when the three inter-related sets of findings, orders thereon, and the opinion of the lower court in the present case are examined.

In the New York decision it was said:

> "But Congress has directed that we allow rates that will yield in the aggregate a return of 5½ or 6 per cent upon the value of the railway property in each of the groups."[8]

[8]Interstate Commerce Commission, No. 11623, In the Matter of Rates, Fares, and Charges of the New York

After pointing out the so-called "loss" to the carriers of approximately twelve million dollars, resulting from the lower rates within that state, it was declared:

> "* * * to that extent the declared purpose of Congress is defeated by a preferential basis of rates and fares maintained by authority of the state of New York."

The report in the Illinois case estimates the "loss" at from seven to fifteen million dollars.[9] It was said in this report:

> "The terms of the act are sufficiently broad to forbid unjust discrimination against interstate commerce without reference to particular persons or localities."[10]

And further:

> "If, without good reason, the fares within a state are lower than those authorized and established for interstate application, intrastate passenger traffic will not contribute its just share to the passenger revenues of the carriers, and the carriers may not earn the statutory return without further increases in the transportation charges on other traffic, including interstate commerce, thus unjustly discriminating against such commerce."[11]

In the Wisconsin case the "loss" was estimated at from $2,400,000 to $6,000,000.[12] "Following the

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Central Railroad Company and Other Railroad Companies in the State of New York, 59 I. C. C. 290, 294; R. pp. 98, 99.

[9]Interstate Commerce Commission, No. 11763, In the Matter of Intrastate Rates Within the State of Illinois, 59 I. C. C. 350, 355; R. p. 31.

[10]*Id.*, 59 I. C. C. 363; R. p. 39.

[11]*Id.*, 59 I. C. C. 365; R. p. 40.

[12]Interstate Commerce Commission, No. 11763, Wisconsin Passenger Fares, 59 I. C. C. 396; R. p. 46.

New York and Illinois cases, and upon this record,"[13] "unjust discrimination against interstate commerce" was found.

In its oral opinion in the present case, the lower court said:

> "When you look to the financial consideration of the act it is self-evident that the purpose of Congress in authorizing the Interstate Commerce Commission to act, and the purpose of the Commission, we find what is necessary to produce the indispensable revenue would be destroyed, if the state were permitted to allow intrastate passengers to ride upon interstate trains at a lesser compensation. We must assume that the calculations of the Interstate Commerce Commission have been based upon the cost of carrying the passengers, and if a rate is made on a basis of passenger per mile and the intrastate passenger paying a lesser rate, it is casting the direct burden upon interstate commerce, and is jeopardizing the power of the national carriers to maintain themselves on the basis which Congress declared they are entitled to maintain."[14]

It is thus in effect asserted, not only that an additional charge may be superimposed upon passengers and shippers in interstate commerce where intrastate revenue is insufficient, but the argument assumes that such result automatically and necessarily follows.

Restated by Commissioner Eastman, in his dissenting opinion in the New York case:

> "In essence, the carriers' position is that when we authorize an increase in interstate rates under

[13] *Id.*, 59 I. C. C. 396; R. p. 18.
[14] R. pp. 11–15.

section 15 (a) of the interstate commerce act a corresponding increase must be made in intrastate rates; otherwise unjust discrimination against interstate commerce results which it is our duty under section 13 to correct."[15]

The obvious result of accepting this premise is to divest the various states of all power over the rates of carriers that engage in interstate commerce in any degree. The Commission in effect recognized this to be so, for it said:

> "It is no answer to this to say that if this conclusion be admitted it may have the effect of completely displacing state jurisdiction over state commerce."[16]

It could not well do otherwise, for, as this court has stated through Mr. Justice Hughes in the *Minnesota Rate Cases*, 230 U. S. 352, at 117:

> "To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed * * * for interstate transportation, is to maintain the power in name while denying it in fact."

The ultimate question thus becomes: Has Congress authorized "the Commission to prescribe intrastate rates and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic?"

> *Houston & Texas R. Co. v. U. S.*, 234 U. S. 342, 357.
> *Minnesota Rate Cases*, 230 U. S. 352, 421.

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[15] 59 I. C. C. 290, 299–300; R. p. 103.
[16] 59 I. C. C. 290, 292; R. pp. 96–97.

2. The question answered: Congress has not invested the Interstate Commerce Commission with unified control over all commerce.

Paragraphs (3) and (4) of section 13 and section 15a, which were added to the Interstate Commerce Act by the Transportation Act of 1920, are both relied upon as making affirmative grants of power. Very clearly, unless the asserted jurisdiction may be found in these provisions, or necessarily implied therefrom, it does not exist, for independently of them, other sections do not suggest it by so much as the shadow of an inference.

a Elementary principles of law to be regarded.

In determining the exact quantum of authority which they bestow upon the commission, certain fundamental legal principles should be steadily kept in mind.

(1) **"The completely internal commerce of the state * * * may be considered as reserved for the state itself."**

Gibbons v. Ogden, 9 Wheat 1, 196.
Trade Mark Cases, 100 U. S. 82, 96-7.
Lord v. Steamship Co., 102 U. S. 541, 543.
Rast v. Van Deman & Lewis Co., 240 U. S. 342, 362.
Hanover Milling Co. v. Metcalf, 240 U. S. 403, 416.

Hammer v. Dagenhart, 247 U. S. 251, 276.
United Drug Co. v. Rectanus, 248 U. S. 90.
Weigle v. Curtice Bros. Co., 248 U. S. 285, 288.
Arkansas Rate Cases, 187 Fed. 290, 297-303.
Allen v. St. Louis, Iron Mt. & S. Ry., 230 U. S. 553.

Covington & Cincinnati B. Co. v. Kentucky, 154 U. S. 204, 209.
So. Pac. R. Co. v. Railroad Commission, 193 Fed. 699, 707.
Munn v. Illinois, 94 U. S. 113.
Peik v. C. & N. W. R. Co., 94 U. S. 164.
Stone v. Farmers' L. & T. Co., 116 U. S. 307.
Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557.
Sands v. Manistee River I. Co., 123 U. S. 288.
Dow v. Beidelman, 125 U. S. 680.
C. M. & St. P. R. Co. v. Minnesota, 134 U. S. 418.
C. & G. T. Co. v. Wellman, 143 U. S. 339.

(2) **"In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution, the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested."**

Ill. Cent. R. Co. v. Public Utilities Comm., 245 U. S. 493, 510.
Reid v. Colorado 187 U. S. 137, 148.
Cummings v. Chicago, 188 U. S. 410, 430.
Savage v. Jones, 225 U. S. 501.
Missouri, Kansas & Texas Ry. Co. v. Harris, 234 U. S. 412, 419.
American Express Co. v. Caldwell, 244 U. S. 617.
Carey v. South Dakota, 250 U. S. 118.
Corn Products Refining Co. v. Eddy, 249 U. S. 427, 435.
State v. Atlantic Coast Line R. Co., 81 So. 498.

(3) **The jurisdiction of the Commission is strictly statutory and cannot be extended by implication over other subjects than those which the act defines.**

Re Express Co., 11 I. C. C. Reports, 677, 683.
Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479.

(4) All former statutes on the same subject, whether repealed or unrepealed, may be considered in construing the provisions that remain in force.

Viterbo v. Friedlander, 120 U. S. 707, 726.
Ex Parte Crow Dog, 109 U. S. 556, 561.
U. S. v. Saunders, 22 Wall. 492.
Rockefeller v. O'Brien, 224 Fed. 541.
U. S. v. Ewing, 237 U. S. 197, 200.

b Other statutory provisions to be regarded.

(1) War-time control.

The most prominent statutory feature to be taken into account is that when these provisions were enacted, unified control was an accomplished legal status. The so-called Federal Control Act[17] had been interpreted by this court, in *Northern Pac. Ry. Co. v. North Dakota*, 250 U. S. 135, 148, as conferring upon the President "the complete and undivided power to fix rates." Had Congress intended to continue exclusive federal control, either by the President or through the Interstate Commerce Commission, a plain and perspicuous model was set before it, which it need only to have followed to have set the question of centralized power beyond all doubt.

[17]Section 10 thereof provided: "That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination."

Unified control was the *status quo*. Was it continued or superseded by the language Congress used?

(2) Provisions for the termination of federal control.

Turning to a detailed consideration of the language actually employed, we find these provisions, which must be regarded as highly pertinent to the present inquiry:

> "TITLE II.—TERMINATION OF FEDERAL CONTROL.
>
> "Sec. 200. (a) Federal control shall terminate at 12.01 a. m., March 1, 1920; * * *
>
> "(b) Thereafter the President shall not have or exercise any of the powers conferred upon him by the Federal Control Act relating— * * *
>
> "(3) To their rates, fares, charges, classifications, regulations, or practices; * * *
>
> "EXISTING RATES TO CONTINUE IN EFFECT.
>
> "Sec. 208. (a) All rates * * * in effect on the lines of carriers *subject to the Interstate Commerce Act*, shall continue in force and effect until thereafter changed by *State or Federal authority, respectively*, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced * * * unless such reduction or change is approved by the Commission.
>
> "(b) All divisions of joint rates * * * in effect between the lines of carriers *subject to the Interstate Commerce Act*, shall continue in force and effect until thereafter changed * * * by State or Federal authorities, respectively." (Italics ours.)

The court will note the particularity with which the instrumentalities common to both classes of commerce are described, and the fullness with which

state control thereover is sanctioned and contemplated. Clearly, a divided, not a unified, control is indicated by the anticipation of a change in rates on the lines of carriers subject to the Interstate Commerce Act, to be made by state authority.

But even more significant, for the purposes of the present inquiry, is the provision that prior to September 1, 1920 no reduction shall be made unless "approved by the Commission." The maxim, *expressio unius*, is clearly applicable. Up to September 1, 1920 the Commission is invested with power of veto, but after that date, reductions might be made without reference to the Commission's attitude.

(3) Reenactment of the proviso in section 1 of the Interstate Commerce Act.

Scarcely less significant than the provisions for the termination of federal control was the reenactment of the proviso found in section 1, as follows:

"TITLE IV.—AMENDMENTS TO INTERSTATE COMMERCE ACT.

"* * *

"(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

"(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to, or from a foreign country from or to any place in the United States as aforesaid; * * *."

(a) **Previous construction of proviso.**

The proviso was thus reenacted in substantially the same language as it originally appeared in 1887. As so written, it had been the subject of repeated judicial construction. After an exhaustive review of legislative history, it was said in *Minnesota Rate Cases*, 230 U. S. 352, 419:

> "There was thus excluded from the provisions of the act that transportation which was 'wholly within one State,' with a specified qualification where its subject was going to or coming from a foreign country."

This was in exact conformity with the uniform construction which preceded it, as evidenced by—

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 457.
Texas & Pacific Ry. Co. v. Int. Com. Comm., 162 U. S. 197, 212.
Missouri Pac. Ry. v. Larabee Mills, 211 U. S. 612, 620.
Int. Com. Comm. v. Goodrich Transportation Co., 224 U. S. 194, 207.

And this construction was continuously adhered to in—

Houston & Texas Ry. Co. v. United States, 234 U. S. 342, 357.
L. & N. R. Co. v. Higdon, 234 U. S. 592, 599.
Chicago etc. Ry. Co. v. Pub. Utilities Comm., 242 U. S. 333, 336–7.
Eastern Texas Railway Co. v. Railroad Commission, 242 Fed. 300, 307.

(b) **Such construction was carried into the new law.**

Under elementary rules, the reenactment of the proviso incorporated into the law its prior interpretation.

Claflin v. Ins. Co., 110 U. S. 81, 93.
Davis v. Chicago, 16 Fed. 309.
I. C. C. v. Del. L. & W. R. Co.,220 U. S. 235.
McDonald v. Hovey, 110 U. S. 619.
Buck Stove Co. v. Vickers, 226 U. S. 205.
U. S. v. Cerecedo Hermanos y. Compania, 209 U. S. 337.
Copper Queen Mining Co. v Arizona Board, 206 U. S. 474.

c. The provisions of paragraphs (3) and (4) of section 13 do not enlarge the power of the Commission, but merely prescribe the course of procedure to be followed in the removal of discrimination resulting from state action.

So far we find nothing to indicate a consummated intention to centralize control of all rates in a national agency, and we come then to a consideratаion of the terms of paragraphs (3) and (4) of section 13.

(1) The language of paragraph (3) emphasizes the continuance of state authority.

The two new paragraphs of section 13 were added to the Interstate Commerce Act by section 416 of the Transportation Act.[18]

[18] "(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the

It is under their provisions that the proceedings before the Commission as to New York, Illinois, and Wisconsin rates were instituted,[19] and they are relied upon as containing an affirmative extension of the power of the Interstate Commerce Commission. An analysis of the two paragraphs in detail reveals in the plainest manner an express recognition of the continuing nature of state authority, and indicates that federal control is of limited extent. The following separate and distinct provisions in paragraph (3) recognizing state authority may be enumerated:

Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the corporation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

"(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localites in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

[19] 59 I. C. C. 294, 352, 392; R. pp. 95, 28, 15.

Paragraph (3) contemplates that there shall be brought in issue "*any rate * * * imposed by authority of any State.*"

The Commission is authorized to confer with "the authorities of any State having *regulatory jurisdiction over the class of persons and corporations subject to this Act.*"

Such conference is to be "with respect to the relationship between rate structures and practices of carriers *subject to the jurisdiction of such State bodies and of the Commission.*"

There is thus recognized, not an exclusive or final jurisdiction in the Interstate Commerce Commission over "rate structures," but a joint, or concurrent, jurisdiction between it and the state bodies.

Authority is granted to hold "joint hearings with any such State regulating bodies *on any matters wherein the Commission is empowered to act* and where the rate-making authority of a State is or may be affected by the action taken by the Commission," again indicating in the plainest possible way that it is the authority of the Commission, and not of the State, that is treated as limited in its scope. The court will note the care with which provision is made for action only "on any matters wherein the Commission is empowered to act." Of course, if the Commission were by this or any other section of the act empowered to act in all matters, or empowered to act so as to set all state authority aside no occasion would have existed for the qualification of its authority in this guarded way.

(2) The words "unjust discrimination against interstate or foreign commerce" do not create additional power.

The words, "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," appear in paragraph (4) of section 13. It might be suggested that, from the mere fact that Congress denounced discrimination against interstate or foreign commerce, it has decisively indicated a separate, and not a unified, control over commerce. For were all commerce placed within the Commission's jurisdiction, plainly there would be no occasion for separate consideration as to the effect upon one class of that commerce, because commerce, from a legal standpoint, would no longer be divided into classes. None the less, it is urged that these words introduce an entirely new element into the law, and extend the power of the Commission.

The contention is thus stated in the Illinois decision:

> "The provision in question reiterates in effect what is stated in section 3, but in it Congress has gone further than declaring that there shall be no undue or unreasonable advantage, preference, or prejudice as between persons and localities, as in section 3, and has forbidden and declared unlawful 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.' * * * The language used is certainly broad enough to cover every discrimination growing out of the relation between intrastate and interstate commerce which injuriously affects the latter."[20]

But this argument has already been met and fully answered by this court. Speaking through Mr. Justice Hughes, it made trenchant commentary upon the extent of power to remove discrimination,

[20] 59 I. C. C. 361-362; R. p. 37.

as it existed prior to the enactment of the Transportation Act. Referring to the provisions of sections 2 and 3 of the Interstate Commerce Act, it was said in *Houston & Texas Ry. v. United States*, 234 U. S. 342, at 356:

> "This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relations of intrastate to interstate rates as maintained by the carrier. It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach."

If the power existed to remove "*all* the discriminations * * * against interstate traffic produced by the relation of intrastate to interstate rates," it is difficult to perceive how an addition to such power is made by specific declaration that *any discrimination is unlawful*. Plainly, the words "preference or advantage" and "prejudice or disadvantage," as they appear in section 3[21] of the Interstate Commerce

[21]Section 3 reads: "It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Every common carrier

Act, all describe the results of discriminatory action, and are discriminations. As it had been said in *United States v. Tozer*, 39 Fed. 901, at 907:

> "The third section of the act *ex industria* prohibits preferences and discriminations 'in any respect whatsoever.'"

In *U. S. v. Delaware L. & W. R. Co.*, 10 Fed. 101, 103, it was said:

> "The latter is comprehensive enough, standing alone, to include every form of unjust discrimination."

In *I. C. C. v. B. & O. R. Co.*, 13 Fed. 37, at 50, the effect of the act was construed to be that carriers—

> "shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue preference or disadvantage * * *."

In *East Tenn. & Ry. Co. v. I. C. C.*, 181 U. S. 1, at 18, it is said:

> "The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference."

I. C. C. v. Chicago G. W. Ry. Co., 209 U. S. 108, illustrates the same understanding.

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subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

In *Penn. Co. v. U. S.*, 236 U. S. 351, the opinion, at page 362, indicates that the terms "preference" and "discrimination" are used interchangeably.

In *Phila. & Reading R. Co. v. U. S.*, 240 U. S. 334, at 340, "undue discrimination" is employed as synonymous with "unreasonable prejudice or disadvantage."

The purpose of the section being to make discrimination unlawful, and the subject matter entrusted to the regulation of the Interstate Commerce Commission being interstate commerce, it follows as a truism that the practices denounced were discriminations against interstate commerce.

Recurring to *Houston & Texas Ry. v. U. S.*, 234 U. S. 342, the head note states:

> "By section 3 of the Act to Regulate Commerce, 24 Stat. 379, 380, Congress has delegated to the Interstate Commerce Commission power to prevent all *discriminations against interstate commerce* by interstate carriers, subject to the Act, which it is within the power of Congress to condemn."

In *American Express Co. v. Caldwell*, 244 U. S. 617, the terms are likewise used interchangeably at pages 625 and 626, it being said on the latter page:

> "* * * the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the *existing discrimination against interstate traffic*,"

while in *Ill. Cent. R. R. Co. v. Public Utilities Comm.*, 245 U. S. 493, 506, it was said, construing the results of the decision in the Shreveport case:

"Where unjust discrimination against interstate commerce arises out of the relation of intrastate to interstate rates this power may be exerted to remove the discrimination, and this whether the intrastate rates are maintained under a local statute or by the voluntary act of the carrier."

As appears from the report of the case, the order of the Commission required the cessation of fares which—

"would produce the discrimination against interstate commerce * * * condemned in the report of the Commission."[22]

In *Memphis Merchants Exchange v. I. C. R. R. Co.*, 43 I. C. C. 378, 387, the Commission also said:

"* * * if rates approved by state authority cause undue discrimination against interstate commerce, it is the duty and within the power of this Commission to require the removal of the discrimination."

Again, in *St. Louis S. W. Ry. Co. v. U. S.*, 245 U. S. 136, the court speaks of practicing discrimination against particular localities, but concludes at page 145:

"It is not primarily an order to remove discrimination in violation of section 3."

In conclusion, the words of *Corona Coal Co. v. Southern Ry. Co.*, 266 Fed. 726, at 729, may be applied:

"So it can be said that this approved rule, in effect already law, was by the Transportation Act of 1920 merely crystallized into statutory form. Can it be urged that the fact it is now imbedded in

[22] 245 U. S. 493, footnote, p. 501.

> the Transportation Act gives it any more far-reaching or controlling influence over the commission than it had as a sanctioned rule?"

If it be said that this construction gives no force or meaning to the words, it may be borne in mind that this court has heretofore been constrained to say of other words added to the Interstate Commerce Act:

> "There is no advance made by them or enlargement of meaning. There was simply a useless tautology."[23]

(3) Paragraphs (3) and (4) merely prescribe the procedure to be followed in the removal of discrimination resulting from state action.

While the introduction of the phrase, "discrimination against interstate or foreign commerce," made no addition to the practices brought within the zone of statutory condemnation—could make nothing a discrimination which was not so before, the two paragraphs added were not for that reason devoid of a well-defined purpose. That purpose very plainly was to eliminate or narrow the twilight zone—to minimize, if not remove, the possibility of conflict between state and federal authority over rates. That such was the congressional intent, subsequent discussion of legislative history will completely demonstrate.

But these provisions, so far from suggesting the abrogation of state authority—

[23] *U. S. v. Penn. R. R. Co.*, 242 U. S. 208, 226.

"all point to a reluctance on the part of Congress to have state action enjoined by federal power."[24]

Increasing emphasis of the principle of comity, where state laws or administrative orders as to rates are drawn in question, has characterized the utterances of this and other federal courts. Illustrations might be multiplied, but it suffices to call attention to the opinions of—

Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 229–30.
Bacon v. Rutland R. Co., 232 U. S. 134.
Boston & M. R. R. v. Niles, 218 Fed. 944, 945.
Palermo Land & Water Co. v. R. R. Comm. of Cal., 227 Fed. 708, 709.
So. Pac. Co. v. Bartine, 170 Fed. 725.
San Diego Land & Town Co. v. Jasper, 189 U. S. 439.

Congress legislated with full knowledge of the declared attitude of the courts in this regard, and, having provided by section 266 of the Judicial Code for the utmost care and circumspection in case of judicial interference with state action, no doubt thought that the Interstate Commerce Commission should be as solicitous as the courts for the preservation of a spirit of harmonious cooperation in disposing of the problems that inevitably arise under our system of dual sovereignties.

The opening phrase, "Whenever in any investigation under the provisions of this Act," connotes investigations already provided for by section 13 as

[24] Language of *L. & N. R. Co. v. Railroad Commission*, 208 Fed. 35, 61, discussing the effect of section 266 of the Judicial Code.

it stood. In the absence of the addition of these paragraphs by amendment, such investigation by the Commission might be conducted "in such manner and by such means as it shall deem proper," but as it now stands, actions which involve state authority require notice to the states, this provision being strongly suggestive of the similar notice required by section 266 of the Judicial Code. Action is to be taken only "after full hearing." The use of the phrase, "full hearing," in and of itself, excludes the idea that ascertainment of mere difference in rate levels was contemplated. That a lower rate will produce less money is obvious. Investigation and full hearing are not ordinarily directed to the ascertainment of the self-evident. To say, however, that the Commission may take into account all of the factors, terms, and conditions that go to the making up of the state rate is but another way of saying that it is invested with jurisdiction to determine the reasonableness of intrastate rates as such. And this is an assumption of the truth of the fundamental premise which requires demonstration.

Further, after such "full hearing," action may be taken only if the Commission "finds discrimination." Findings are not required in the case of other investigations, except as provided by section 14 of the Interstate Commerce Act, when damages are awarded. This provision for findings accords with the oft-repeated declaration of this court, elsewhere emphasized herein, that where discrimination is alleged to arise by virtue of state action, exact and definite findings to that effect are necessary so that the scope

of federal interference with state authority may be plainly understood.

The court is urged to infer an intention to enlarge the scope of the discrimination prohibited, because by Paragraph (3) of section 13, "the carrier concerned" is authorized to file a petition which had not been theretofore permitted. Plainly, this provision went no further than to permit the exercise of jurisdiction by the Commission in the absence of complaint by a person or locality affected. This court had pointed out in *Texas & Pac. Ry. v. Interstate Commerce Commission*, 162 U. S. 197, 239, that the court was not justified in finding discrimination, "as there was no person, firm or corporation complaining that he or they had been aggrieved." In *Philadelphia & Reading Ry. v. U. S.*, 240 U. S. 334, as appears from the head note, an order was found insufficient because "the community declared to be prejudiced by the established conditions has not complained." It was doubtless in view of these decisions that this provision authorizing the carrier to file a petition was framed, but in the nature of things, it will not be presumed that the preexisting character of discrimination was altered.

One additional and important power was conferred upon the Commission. But this is directly in line with the general thought already emphasized. Prior to the enactment of the Transportation Act and the addition of these two paragraphs, as this court pointed out in the *South Dakota Express Case* in a proceeding for the removal of discrimination arising from the application of state rates, the order of the Interstate Commerce Commission—

> "properly left to the carrier's discretion to determine *how* the discrimination should be removed; that is, whether by lowering the interstate rates or by raising the intrastate rates or by doing both."[25]

The carrier thus absolved from the normal restraint of state authority and invested with discretion to proceed in accordance with its own judgment, might, if so disposed, readily aggravate a situation in the nature of things already delicate enough. It is easy to see that a rate or practice, so modified or initiated by it, might lead to further conflict. Echoes of such a controversy reached this court in *Looney v. Crane*, 247 U. S. 178. Obviously, the occasion for irritation and uncertainty would be minimized if the rate substituted were fixed by the Commission, instead of being left to the judgment of the carrier. Hence, Congress very wisely declared that in such case the Commission shall—

> "prescribe the rate, fare, or charge * * * thereafter to be charged * * * in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination."

(4) Discrimination defined.

That this section does no more than provide the machinery for the removal of discrimination, and does not enlarge the subject matter of jurisdiction, is thus decisively settled by the decisions of this court. With equal clarity the court has defined that which constitutes an unjust discrimination to be removed.

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[25] *Amer. Express Co. v. Caldwell*, 244 U. S. 617, 625.
See also *Houston & Tex. Ry. v. U. S.*, 234 U. S. 342, 349.

In *Houston & Texas Ry. v. United States*, 234 U. S. 342, 353-4, Mr. Justice Hughes with his usual lucidity declared that discrimination was prohibited "to keep the highways of interstate communication open to interstate traffic upon fair and equal terms." To that end Congress has forbidden—

> "any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic."[28]

Discrimination is to be judged by its effect, whether, as stated in *L. & N. R. Co. v. Eubank*, 184 U. S. 27, 36, "the necessary result" thereof—

> "may be to limit or prohibit the transportation of articles from without the state to a point within it, or from a point within to a point without the state."

In *Interstate Commerce Commission v. Chicago G. W. Ry.*, 209 U. S. 108, at 122-3, it was said:

> "as the findings of the court show that the result of the new rates has not been to change the volume of traffic going to Chicago, or materially affect the business of the original complainant, it would seem necessarily to result that the charge of an unlawful discrimination is not proved."

And more recently, in *Denver & R. G. R. R. Co. v. Denver*, 250, U. S. 241, 246, it was said:

> "The ordinance makes no discrimination against interstate commerce, will not impede its movement in regular course, and will affect it only incidentally and indirectly."

Other definitions of unjust discrimination may be found in standard works of reference.

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[28] P. 355.

10 *C. J.* 473, 491, 492.
Judson, *Interstate Commerce*, sec. 222, p. 338; sec. 316, p. 415.

The Interstate Commerce Commission has gone on record in *Memphis Merchants' Exchange, et al. v. Ill. Cent. R. Co.*, 13 I. C. C. 378, 387:

> "The mere maintenance of a rate for movement of traffic wholly within a state lower than a rate found reasonable by this Commission for the local state portion of a through interstate movement does not of itself constitute undue discrimination within the meaning of the act. * * * It is only in cases where the rates prescribed by state authorities necessarily operate to unduly prefer a state over an interstate shipper, or to otherwise interfere with the proper application of rates prescribed by this Commission, that the authority of the federal law is properly to be exercised."

See also:

Holmes & Hollowell Co. v. Great Northern Ry., 37 I. C. C. 627, 630.
Shands v. S. A. L. Ry. Co., 31 I. C. C. 211, 215.

It is thus clear that discrimination exists only where impediment of movement can be shown. An intrastate rate produces discrimination when the necessary result of its maintenance in force is to cause a substantial number of people who would otherwise travel in interstate commerce to desert that travel for intrastate commerce, or not to travel at all. The results of such change or diversion are reflected in a substantial loss of earnings from interstate commerce by the change of its character, or in discouragement to the conduct of such commerce. Discrimination as

to passenger service arises when, and only when, a person who could or would travel in interstate commerce is or may be, by the operation of the rate or other practice complained of, caused to travel in intrastate commerce or to stay at home, or be subjected to handicap in direct competition with another traveling in intrastate commerce.

To the extent, then, that state rates actually operate to prevent movement of passengers in interstate commerce, or place persons traveling therein at a disadvantage, do such rates discriminate against interstate commerce.

(5) Mere difference in rate level does not constitute discrimination, in the absence of unified control.

The weakness of the argument that discrimination arises from a mere difference of rate level lies in the assumption that passengers in interstate commerce will be called upon to make good the deficiencies arising from the so-called "loss" of revenue from intrastate commerce. But unless it can be shown that such deficiencies can or must be recouped from interstate commerce, no such result will follow. Very clearly, a charge of discrimination cannot be based upon the theory that interstate carriers must do that which they are wholly without power to do. Before discrimination may be predicated upon a lower rate of earnings upon state business, it must be demonstrated that there is some principle of constitutional or statutory law which requires that the rate of earnings shall be the same.

This so-called revenue discrimination is pressed upon the court with apparent confidence, as adequate

foundation for the Commission's action. Though it be deemed a trite recital, it may serve to clarify the situation, if the successive steps in the evolution of a carrier conducting business within and into and out of a state be traced. Let us start with a common carrier locally owned, conducting its business between two points wholly within a state. We may assume a similar utility operated between one of those points and a point without the state. The interstate transportation agency thus supposed may be highly profitable; the domestic agency wholly unprofitable. But increase or decrease in the revenues of one can and does in no way affect the other, and it would never be suggested that a low rate of return for domestic business would work a discrimination against the interstate business. Let another step be taken. The owner of the profitable utility becomes the proprietor of the unprofitable one. At this point the element of confusion is introduced, for obviously, if a profit is to be derived from the business in the aggregate, the profitable portion of the combined venture must be sufficiently remunerative to make up the deficiencies resulting from the unprofitable one. What is lost sight of is that the mere accident of ownership, in theory of law, does not in any way vary the preexisting want of relation between the two sets of business. One is to be tested as to its rates by the value of the property used and useful within the state, and the amount of return therefrom; the other stands or falls by the same test. The single corporation or organization is thus in effect possessed of a double identity. Physically, it is the instrumentality of commerce, broadly considered. Legally, it is two

separate instruments—one an agency of domestic commerce; the other an agency of commerce between the states. Failure to obtain an adequate revenue in its intrastate business might be construed as putting a burden upon the carrier. Indeed, the language of the decisions goes much beyond that, for compulsion to render service at a loss is something more than a burden; it is the taking of property without due process of law. But it is taking its property as an intrastate carrier, and not as an interstate carrier, and no burden is placed upon interstate commerce.

That this is true is demonstrated by the long line of decisions which hold that calculations as to what shall constitute a reasonable rate of return from property devoted to internal commerce shall be made without regard to the returns from interstate commerce. The complete absence of a reciprocal relationship between the two classes of commerce, prior to the enactment of the Transportation Act, is thoroughly settled.

In *Smyth v. Ames*, 169 U. S. 466, 511, it was specifically ruled:

> "Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, *nor the latter the losses on domestic business.*"

Minnesota Rate Cases, 230 U. S. 352.
Chicago, etc. R. Co. v. Dey, 35 Fed. 866, 1 L. R. A. 711.

Northern Pac. R. Co. v. Keyes, 91 Fed. 47.
Seaboard Air Line R. Co. v. Alabama R. Comm., 155 Fed. 792.
In re Arkansas R. Rates, 163 Fed. 141.
St. Louis, etc. R. Co., v. Hadley, 168 Fed. 317.
Missouri, etc. R. Co. v. Love, 177 Fed. 493.
Western R. of Alabama v. Alabama R. Comm., 197 Fed. 954
State v. Atlantic Coast Line R. Co., 48 Fla. 147, 37 So. 657, affirmed 203 U. S. 256, 7 S. Ct. 108, 51 U. S. (L. ed.) 174.
Nor. Pac. Ry. Co. v. N. D., 236 U. S. 585, 600, 601, Ann. Cas. 1916A, 1.
Norfolk, etc. Ry. Co. v. Conley, 236 U. S. 605, 612.
Manufacturer's Light etc. Co. v. Ott, 215 Fed. 940, 951.
Trust Co. of Amer. v. Chicago etc. Ry. Co., 199 Fed. 593, 601, 605.
Louisville etc. R. Co. v. Railroad Commission, 196 Fed. 800, 817, 823, 824.
In re Arkansas Rate Cases, 187 Fed. 290, 320.

Northern Pacific Railway Co. v. N. D., 236 U. S. 585, at 598, contains an application of the same principle in these words:

> "Certainly it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action."
>
> *Norfolk & West. Ry. v. West Va.*, 236 U. S. 605, at 612.

Decisions in which the court has worked out the principle that a bill of complaint challenging the constitutionality of a schedule of state rates is insufficient unless detailed allegations are presented as to value of property, earnings, and expenses within the state,

sustain in the fullest degree the principle that property or earnings from one type of commerce are not to be taken into account in any consideration relative to the earnings from the other species of commerce.[27]

The collection of any rate, whether 5½ or 6 per cent or otherwise, in the course of regulation and control, in the interest of the commerce of the United States considered as a whole or otherwise, must rest for its justification upon the foundation that it constitutes a reasonable rate of return to the carrier, and that it likewise operates to fix a rate just and reasonable, so far as the individual shipper or passenger is concerned. Otherwise, it must fail for want of constitutional power.

> *Smyth v. Ames*, 169 U. S. 466.
> *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578.
> *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79.
> *Puget Sound Electric Ry. Co. v. Railroad Commission*, 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913B, 768, and numerous cases cited.

Up to the extreme limit of reasonableness, rates for the carriage of commerce, whether intrastate or interstate, may be imposed. Up to that point, there is no burden upon interstate commerce, and no discrimination against it, unless it arise as the result of direct competitive relation between individuals. Beyond that point, neither Congress nor the Commission may constitutionally authorize the carrier to go. So long as the historic conception, by

[27]See p. 94, this brief.

which the judiciary and the legislature alike have treated these two classes of commerce as separate and distinct in character, continues, it follows as an axiom that interstate commerce is not and cannot be burdened through the inadequacy of intrastate rates. Therefore, it is only by finding in the language of the act some positive mandate to the Commission to bring about ratable contribution to the support of the common instrumentalities of commerce that this contention may prevail. To say that interstate commerce is burdened by reason of failure to derive adequate revenue from intrastate commerce is, in effect, to beg the entire question at issue, unless it first be established that there is an obligation, enforcible by the Interstate Commerce Commission, that revenue production shall be upon exactly the same basis as to each of the classes of commerce.

If unified control of commerce exists, therefore, it must be by virtue of some other provision of the Interstate Commerce Act.

d. Section 15a, created by the Transportation Act, did not provide for unified control of commerce, but merely prescribed a rule of rate-making and valuation to be followed in the exercise of pre-existing jurisdiction over transportation in interstate commerce.

The only remaining provision possibly to be relied upon is section 15a, created by section 122 of the Transportation Act.[28]

[28] "(1) When used in this section the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term 'carrier' means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (a) sleeping-car companies and express companies,

(1) No analogy to war-time control.

It is argued in effect that the language here used is quite as sweeping as that of the Federal Control Act, construed by this court as establishing unified control, and that hence an intention is demonstrated to place the regulation of all commerce under the control of the Interstate Commerce Commission. But the distinction between the two situations is obvious. The Federal Control Act, being a subsequent enactment, displaced all conflictiong provisions of a prior law upon the same subject.

(b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivison thereof; and the term 'net railway operating income' means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

"(3) The Commission shall from time to time determine and make public what percentage of such aggregate property

Now we are dealing with a definite reiteration of the limitation of the proviso, and the supposed exemption from its terms is claimed to arise because general language was simultaneously used. The ridiculous result of this argument finds ready illustration by applying its reasoning to other provisions of the act. Section 1 contains the sweeping declaration that—

> "The provisions of this Act shall apply * * * to any common carrier or carriers engaged in the transportation of passengers or property * * * from one State or Territory * * * to any other State or Territory."

Language more completely inclusive could not have been employed, and if mere generality of expression were the test, then of necessity the effect of the proviso would be destroyed, solely because the language whose application it sought to limit, standing alone, was unlimited.

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value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account."

(2) Proviso reenacted contemporaneously.

Even at the risk of overemphasis, attention is again drawn to the fact that the proviso, reenacted after repeated construction, declares—

> "The provisions of this *Act* * * * shall not apply—
> "(a) To the transportation of passengers * * * wholly within one State."

This is quite as decisive as if it read: "no provision of the act," or "no section of the act" shall apply to such transportation.

Nowhere is there a suggestion that any section or provision of the act is to be excluded from the operation of the proviso. Every section of the act must, therefore, be read as if its terms were modified by the insertion of the language of the proviso. If this be not so, the benefits of the rule of convenience, which permits the definition of a term or the condensation of a paragraph into a word or phrase, are lost, and the necessity revived of resorting to the cumbrous expedient of painstaking and detailed repetition in successive sections and paragraphs of the exclusion sought to be accomplished by one comprehensive declaration.

(3) Plain declaration in other cases where exclusive control is intended.

Congress has affirmed this to be its conception, for when it saw fit in other portions of the act to override the proviso, it used plain words to accomplish that intent. In its wisdom it decided to place the matter of issuing securities under the exclusive con-

trol of the Interstate Commerce Commission by the addition of section 20a to the Interstate Commerce Act.[29] Paragraph (2) makes it unlawful—

> "for any carrier to issue any share of capital stock * * * even though permitted by the authority creating the carrier corporation,"

unless authorized by the Commission. And by paragraph (7) it was declared:

> "The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

(4) Re-definition of "carrier" by paragraph (1) does not enlarge jurisdiction.

Paragraph (1) of the new section excludes four separate classes of carriers otherwise subject to its operation. That such elimination should operate to broaden the scope of regulation over the carriers not so excluded would be so singular an inference as to verge upon absurdity.

The situation is ruled by the language of this court in *Corn Products Refining Co. v. Eddy*, 249 U. S. 427, at 439. The court had under consideration a proviso in the Food and Drugs Act of Congress, which declared unlimited exemptions from liability to disclose trade formulas. Because of the general language of the proviso, the argument was made that Congress intended to secure freedom from state interference,

[29]Sec. 439 of the Transportation Act.

but the court disposed of the contention by saying, as to this language, that it—

> "merely relates to the interpretation of the requirements of the federal act and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions."

As noted at page 135 of this opinion, the same language had been employed by the court in the earlier case of *Savage v. Jones*, 225 U. S. 501.

(5) Whatever is to be done by the Commission is done in the exercise of its power to prescribe just and reasonable rates.

The duty enjoined upon the Commission by paragraph (2) is "in the exercise of its power to prescribe just and reasonable rates." What, then, was the power of the Interstate Commerce Commission in prescribing reasonable rates?

In *Minnesota Rate Cases*, 230 U. S. 352, at 418, this court said:

> "Congress amended the act so as to confer upon the Federal Commission power to prescribe maximum *interstate* rates."

That this is so is unmistakably disclosed by other provisions of the act. Of necessity the power of the Commission to prescribe just and reasonable rates must coincide with the duty of the carriers to observe such rates. Paragraph (1) of section 1 of the Interstate Commerce Act, as amended, prescribes the duty of the carrier to furnish transportation upon reasonable request, and—

> "to establish through routes and just and reasonable rates, fares, and charges applicable thereto."

Paragraph (5) declares the rule:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * * ."

Paragraph (6) prescribes the duty—

> "to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed."

Occurring as they do in the very section that contains the proviso restricting the operation of the act to interstate transportation, there can be no doubt but that all of these rules and prescriptions relate to interstate commerce only. It is thus established as fundamental that it is reasonable rates for the transportation of interstate commerce that are enjoined upon the carriers, and that, so far as the Interstate Commerce Act is concerned, no duty to maintain reasonable rates for the transportation of internal commerce is sought to be imposed.

Bearing this in mind, we pass to section 15 of the act, as amended by section 418 of the Transportation Act, which confers upon the Interstate Commerce Commission the affirmative power to fix reasonable rates, and we find that paragraph (1) specifically restricts the jurisdiction of the Commission in that regard to rates—

"collected by any common carrier or carriers subject to this Act for the *transportation of persons* or property or for the transmission of messages *as defined in the first section of this Act.*"

That transportation defined in section 1 excludes transportation wholly within a state is self-apparent, and it is demonstrated thus that the power conferred upon the Commission was the power to prescribe just and reasonable rates in interstate commerce, and not in intrastate commerce.

(6) This section does not give more power, but instructs the Commission how to exercise the power it already possessed.

In the exercise of the power to prescribe reasonable rates, the Commission is instructed to procure an income for the carriers amounting—

"*as nearly as may be*, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the *service* of *transportation*."

"Transportation," as here used, plainly relates to transportation as defined in section 1, *i. e.*, transportation in interstate commerce.

Senator Cummins, the author of this portion of the law, phrased its theory thus:

"If there were but one railway in the country, it would be entirely possible for the regulating commission to fix rates for it under which it could not earn more than 6 or 7 per cent upon the value of its property, but we have a thousand railways; and rates for transportation must be fixed with reference to all of them and to the needs of the people to whom all of them render their service."[30]

[30]Senate Report No. 304, 66th Cong. 1st Sess., November 10, 1919, p. 13.

If an actual consolidation of all the railroad properties of the United States, as the result of their gradual acquisition and merger, had come to pass, very plainly the result of that consolidation would not give the Interstate Commerce Commission jurisdiction over intrastate rates. How, then, can a direction to assume a condition of unity bring about a result more radical than that which would be produced by the actual fact. This language does not seek or purport to enlarge power. In the process of rate-making, it merely prescribes a theoretical rule of valuation. It but directs the manner in which existing power shall be exercised, and this power, in the nature of things, in the absence of positive contrary direction, would continue to be exercised over the same subject matter that had lain within the control of the Commission prior to the declaration of the rule. The situation is distinctly analogous to one that would arise had some other theory of valuation been enjoined upon the Commission by legislative direction, such, for instance, as sole reliance upon the cost of reproduction, capitalization of earnings or valuation of stocks and bonds. Should this court finally commit itself to any one of these theories to the exclusion of others, in arriving at the fair value of property upon which a return was to be made, it would not follow that the internal commerce of the states would thereby come within the scope of the Commission's regulation. The same power would exist as theretofore, and only the rule for its exercise and application would be changed in the particulars indicated.

Having prescribed the basis of valuation, the rate of return upon such valuation is directed to be found as 5½ to 6 per cent thereof.

The question of what would constitute a fair rate of return from property, used and useful, in the prosecution of *interstate* commerce has apparently never been passed upon by this court. But in view of the declared analogy of federal control over interstate commerce to state control over domestic commerce, there is no reason to doubt but that in a proper case the court would declare a rate of less than 6 per cent inadequate. Such judicial declaration of a reasonable rate of return would not bring about an alteration in the elements of the property to be regulated. The enunciation by Congress of what shall be taken as a fair rate of return cannot operate more strongly to such end than the declaration of the judiciary. For in the last analysis, the legislative declaration is merely tentative, the court must finally determine whether the rate results in violation of the due process of law contemplated by the Fifth Amendment or not.

(7) Even though Congress intended that carrier property employed in intrastate commerce should be included in the aggregate property value upon which a fair return is to be earned, it does not follow that it intended to invest the Interstate Commerce Commission with the rate-making power in intrastate commerce.

For a two-year period Congress prescribed 5½ to 6 per cent as a fair return upon the aggregate railway property used in the service of transportation. As we have seen, unless the effect of the proviso

is to be completely nullified, this must be construed as restricted to property devoted to the service of interstate transportation. But if it be assumed that the aim was to insure such return upon property used in all transportation, it by no means follows that Congress empowered the Commission to fix all rates. The direction merely is to attain the indicated result "as nearly as may be," which is but another way of saying that the result should be attained, as far as practicable, in view of existing legal principles.

Paragraph (5) of section 15a expressly recognizes the nonexistence of "regulation and control in the interest of the commerce of the United States considered as a whole," and, by reason of the absence of such regulation and control creates a trusteeship of a portion of the "railway operating income substantially and unreasonably in excess of a fair return" expected to result in favor of certain carriers under the provisions of the act.[31] Plainly, an approximation is all that is aimed at. We are told that 85 per cent of the commerce of the nation is interstate, and but 15 per cent is intrastate. Manifestly, the return upon the 15 per cent might be substantially depreciated before the return from commerce in the aggregate would reflect an appreciable diminution.

But Congress could have no reason to apprehend that the return from the 15 per cent of intrastate

[31]Serious doubt arises whether this recognition of an excessive and unreasonable levy upon the commerce of the nation, read in connection with section 17 of the act which denies a right of action upon the ground of such excessive charge, does not operate a denial of due process of law. See opinion of Charles E. Hughes, Hearings on H. R. 1378, pp. 2985–2986. Whether the entire act is thus invalidated is apart from the purpose of the present argument.

business would fall below the level of 5½ or 6 per cent prescribed. No legislative safeguard to that end was required. The Fourteenth Amendment had written into the constitution the requirement that the states must permit rates that will insure a return not merely reasonable but adequate, and the courts, in whom the ultimate power of protection rests, have repeatedly declared that no rate producing less than 6 per cent can be sustained. Indications are that 7 per cent must be provided.

Lincoln Gas Co. v. Lincoln, 250 U. S. 256, 267.
Denver v. Denver Water Co., 246 U. S. 178, 194.
Willcox v. Con. Gas. Co., 212 U. S. 19.
Joplin & P. Ry. Co. v. Pub. Serv. Comm., 267 Fed. 584.
St. Joseph Ry. Light H. & P. Co. v. Pub. Serv. Comm., 268 Fed. 267, 268.
Cons. Gas Co. of New York v. Newton, 267 Fed. 231, 241.

With the return of 6 to 7 per cent available from the 15 per cent devoted to domestic commerce, Congress was under no necessity to provide safeguards to insure an average return of 5½ or 6 per cent. But we find it broadly asserted:

> "The right to judicial relief is also wholly inadequate. The difficulty of establishing the value of the property employed in the transportation service and the apportionment of such value, and the expense of conducting the business as between the freight and passenger service, State and interstate freight service, State and interstate passenger service, and as between passenger transportation and mail and express is insuperable."[32]

[32]Hearings before the Com. on Int. Commerce, U. S. Senate, 65th Cong., 3d Sess., Vol. I, Statement of Mr. S. T. Bledsoe, p. 512.

And this thought finds ready echo in the opinion of the Commission:

> "The needs of these interstate carriers for revenue to enable them to provide adequate transportation service and facilities are immediate and, in the interest of the public, *can not be permitted to await the consideration in detail of individual fares, charges, and rates.*"[33]

Stripped of superficial verbiage, the proposition comes to this: A burden or discrimination in fact has been thrown upon interstate commerce through the breakdown of judicial machinery, and in recognition of that fact Congress has provided an easier and more informal method of protecting the carrier's interest.

The falsity of the assumption that existing judicial supervision over state authorities is so inadequate as to require this substituted remedy is demonstrated by the record in the present case. The enforcement of the Wisconsin statute prescribing a two-cent fare was enjoined by the District Court in an independent proceeding.[34] Like action has been taken by courts with reference to the rates of other states. Wherever a *prima facie* showing of confiscation has been made, the federal courts have been alert to protect the interests of the carriers, and there is no reason to apprehend that, through their laxness and inefficiency, the reasonable rate of return to which the carrier is entitled from all its business will be denied to it. So far as dispatch is concerned, the advantage is all in favor of judicial review.

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[33]59 I. C. C. 291; R. p. 99.
[34]59 I. C. C. 391; R. p. 44.

In the present case, a restraining order was obtained on December 3, followed by an interlocutory injunction on December 11. Had the decision been against the carrier, an immediate appeal to this court was available. Contrasted with this, we find that the proceeding before the Commission was instituted in August, and decided upon November 27, —a clear gain of at least sixty days in favor of judicial procedure.

But were it otherwise, this plea for action on the score of "manifest impossibility" is not new to this court. When similarly urged in *Smyth v. Ames*, 171 U. S. 361, 365, its validity was denied, and again, in *Minnesota Rate Cases*, 230 U. S. 352, at 466. And so recently as *Kansas City So. Ry. v. Int. Com. Comm.*, 252 U. S. 178, mandamus was granted to compel the Interstate Commerce Commission to act, notwithstanding "the supposed impossibility of performing the statutory duty or the difficulties involved in so doing."

It is scarcely conceivable that the court will now sanction a sweeping assumption of power, in the face of long settled presumption against its existence, and in the absence of language clearly manifesting a purpose to create it, solely by reason of this supposed "impossibility" to obtain relief before the courts.

(8) **Conclusion as to the interpretation of the act.**

The terse language of Commissioner Eastman, dissenting, in the New York Case sums up the situation:

> "Turning to section 15(a), our duty to establish rates which will enable carrier so earn a fair return

> upon the aggregate value of their railway property relates and is confined to *interstate* rates. Without regard to the limitation of section 1, there is no 'clearly manifested purpose' to extend our authority over intrastate rates, and certainly there is none in view of this limitation. Nor is such a conclusion inconsistent with a reasonable interpretation and practical application of this section. A rule is laid down for our guidance, but our duty is confined to interstate rates and it is a duty merely to maintain such rates at the level which will yield the return desired, assuming that the states will exercise their own power justly and taking into consideration our right to correct intrastate rates which unjustly discriminate against interstate commerce."[35]

To these words may be added the language of this court in *Interstate Commerce Commission v. Railway Co.*, 167 U. S. 479, at 511:

> "Our conlusion then is that Congress has not conferred upon the commission the legislative power of prescribing rates either maximum or minimum or absolute. As it did not give the express power to the commission it did not intend to secure the same result indirectly."

For, as said by this court in *Minnesota Rate Cases*, 230 U. S. 352, at 421:

> "It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the States without the provision of a substitute."

And as said in *U. S. v. Penn. R. R. Co.*, 242 U. S. 208, 231, with reference to another amendment to the Interstate Commerce Act:

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[35]59 I. C. C. 301; R. pp. 101-105.

"If Congress had intended such consequence * * * it would not have left its intention to be evolved from obscure language, but would have put it in explicit declaration."

c. The legislative history of the Transportation Act demonstrates the correctness of the foregoing interpretation of the law.

The bills which were finally merged in the Transportation Act of 1920, as originally introduced in the two houses of Congress; the hearings before their committees; and the reports of such committees, including oral statements explanatory thereof, remove all doubt that may exist as to the complete want of intention on the part of Congress to authorize more extended power to interfere wiht the rate-making power of the states. Their authority was left exactly where Congress found it, to be disturbed by the Interstate Commerce Commission when, and only when, discrimination, as previously understood and interpreted, was established, in accordance with the new scheme of procedure which insures more painstaking regard for state jurisdiction and greater care and certainty in the determination of the actual existence of discrimination, and a more precise and definite method for its removal.

(1) The rule permitting the examination of legislative proceedings.

The propriety of examining the history of a legislative act in case of doubt as to legislative intent is well established. Resort is permitted to the text of the law as originally introduced, amendments thereto adopted and rejected, and the reports of the committees presenting the act in final form.

Gardner v. Barney, 6 Wall. 499.
Blake v. National City Bank, 23 Wall. 307, 23 L. Ed. 119, 121.
Houston & Texas Ry. v. U. S., 234 U. S. 342.
St. L. & Iron Mt. Ry. v. Craft, 237 U. S. 648.
Caminetti v. U. S., 242 U. S. 470, 490.
U. S. v. St. Paul, Mnpls. & Manitoba Ry. Co., 247 U. S. 310, and cases cited at page 318.

"Explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage"—"may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure."

Duplex Printing Press Co. v. Deering, 65 L. Ed. 176, 183, Adv. Op. No. 6, Feb. 1, 1921.
Penn. R. Co. v. Int. Coal Co., 230 U. S. 184, 198, 199, 57 L. ed. 1446, 1451, 1452, 33 Sup. Ct. Rep. 893, Ann. Cas. 1915A, 315.
United States v. Coca Cola Co., 241 U. S. 265, 281, 60 L. ed. 995, 1002, 36 Sup. Ct. Rep. 573, Ann. Cas. 1917C, 187.
United States v. St. Paul, M. & M. R. Co., 247 U. S. 310, 318, 62 L. ed. 1130, 1134, 38 Sup. Ct. Rep. 525.

Hearings and testimony taken before legislative committees likewise enable the court to look—

> "at contemporaneous events, the situation as it existed and as it was pressed upon the attention of the legislative body."[36]

The right to examine such hearings was exercised without comment by this court in *U. S. v. Penn. R. R. Co.*, 242 U. S. 208, 223–226, and the hearings upon the Transportation Act itself were referred to by the District Court in *Corona Coal Co. v. So. Ry. Co.*, 266 Fed. 726, 732.

[36] *Church of the Holy Trinity v. U. S.*, 143 U. S. 457, 463.

(2) The legislative history of the Transportation Act detailed.

(a) History in the House of Representatives.

The formal legislative history in the House began with the introduction of a bill by Mr. Esch on June 2, 1919. The significant provisions thereof, from the standpoint of the present inquiry, are that it introduced an exception into the proviso of section 1.

> "That the provisions of this act, *except as expressly provided in section 13 thereof*, shall not apply to the transportation of passengers * * * wholly within one State."[37]

Section 13 was proposed to be amended by the addition of two new paragraphs thereto. These paragraphs were phrased substantially as finally enacted, except that the words, "or any undue burden upon interstate or foreign commerce," appeared in what has now become paragraph (4). A rule of rate-making proposed by amendment to section 15, went no further than to suggest that there should be taken into consideration the cost of labor and other operating costs. The bill in this form was commonly referred to as the Commerce Commission Plan, and was made the basis for extended hearings, beginning on July 15 and terminating on September 27, as to which the Committee stated in its report to the House:

> "No more elaborate and intensive investigation of the railroads and their relations to the Government and to the public has ever been undertaken by a committee of Congress. Your committee respectfully offers these hearings for careful study not only

[37] H. R. 4378, 66th Cong., 1st Sess., p. 2, lines 22–25.

by Members of Congress but by the country generally."[38]

Representations were made as to the desirability of vesting all rate-making power directly in the Interstate Commerce Commission by numerous individuals and organizations.[39] Mr. Clark, of the Interstate Commerce Commission, to whom rumor assigns an important part in the preparation of the bill as presented, was the first witness to appear before the Committee.[40] Interrogated as to the meaning of the phrase, "undue burden upon interstate commerce," he answered:

> "If it should appear that the conditions of operation and of transportation within the State were substantially similar to those surrounding the traffic into and out of the State and the interstate rates were reasonable, a substantially lower level of State rates would be casting an undue burden upon interstate commerce."[41]

When recalled, he expressed the same view.[42]

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[38] House Report, No. 456, 66th Cong., 1st Sess., p. 2.

[39] Hearings before the Com. on Interstate and Foreign Commerce of the House of Representatives, 66th Cong., 1st Sess., on H. R. 4378. See the testimony of Harry A. Wheeler, who presented the plan of the National Chamber of Commerce (pp. 190–197); the testimony of Mr. Edgar J. Rich, who presented the so-called New England and Texas Plan (p. 385); Mr. P. S. Lovett (pp. 1311–13); Mr. Bird M. Robinson, counsel for the Short-Line Railroad (p. 1951); Senator I. L. Lenroot (p. 2119); Mr. C. A. Prouty (p. 3159); Mr. F. P. Hixton (p. 3389). There is nothing to suggest, however, that such views met with favor, and the plan was never sponsored by the Committee.

[40] *Id.*, pp. 8–139.

[41] *Id.*, p. 70.

[42] *Id.*, pp. 2949, 2964.

One witness stated of this provision:

> "* * * it gives to the Interstate Commerce Commission practically exclusive control of the intrastate rates."[43]

Other witnesses who desired to have this result brought about asserted similar conclusions.[44]

Those opposed to the inclusion of this phraseology as written were equally clear as to its effect. A leading witness said:

> "* * * it is putting, in a general way, all this State traffic, by statute, under the control of the Interstate Commerce Commission whenever it wishes to exercise it."[45]

The foregoing is believed to be a fair reflection of the thirty-six hundred odd pages of testimony that were developed by the Committee, and puts the court as completely in possession of the situation as would much more extended and numerous quotations.

It may very well be doubted whether the use of the words "undue burden" would operate to produce the result claimed.[46]

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[43] *Id.*, p. 363. Statement of Mr. Edgar J. Rich.

[44] *Id.* See testimony of Mr. Forney Johnston, advisory counsel for the National Association of Owners of Railroad Securities (p. 1078); Mr. Alfred P. Thom, general counsel for the Association of Railway Executives (pp. 1230, 2997); Mr. R. S. Lovett (p. 1312); Mr. S. T. Bledsoe (pp. 1452–3).

[45] *Id.*, p. 923. Statement of Mr. Decker. See also testimony of Mr. Charles E. Elmquist, general solicitor for the National Association of Railway and Utilities Commissioners (p. 1622); Mr. Guy M. Freer (pp. 2242–3); Mr. Clifford Thorne (p. 2751, *et seq.*)

[46] *Id.*, p. 481. Statement of Mr. Wimbish: "A little clear thinking makes it plain that lower State rates can not cast

However, there can be no doubt but that full confidence existed, upon the part of those who sponsored the incorporation of this particular phraseology, that it would result in conferring upon the Interstate Commerce Commission authority to accomplish precisely the end now sought. Upon the other hand, those who adhered to the belief that a sound public policy required the retention of the fullest measure of state control likewise entertained the liveliest apprehension that the retention of this phrase might sanction the assumption of such authority by the Interstate Commerce Commission.

After the conclusion of these hearings, the bill was again introduced as H. R. 10453. In this amended form, we find that the exception which the earlier bill had written into section 1 of the Commerce Act was omitted. Section 115 contained the amendments to section 13 of the Commerce Act, and retained the same language as to "any undue burden upon interstate or foreign commerce."[47] The rule of rate-mak-

a burden upon interstate commerce or impede its flow unless such commerce is injuriously affected; and that can be truly predicated only of such State rates as may constitute an unjust discrimination against shippers in interstate commerce and the localities in which they do business.

"How is it possible, may I inquire, that a burden can be cast upon interstate commerce, dissociated from those who engage in interstate commerce? Interstate commerce is not a living thing. It is not an entity. It is merely a channel, an avenue, and instrumentality. Unless some impediment is placed upon the free flow of that commerce, which would prejudice the shipper or the community, then to my mind it is impossible to see that any burden has been cast upon anybody. Now, if there be such burden, it must arise at last, from unjust discrimination. If such unjust discrimination exists, the legal remedy now is adequate, and I hardly see how you can improve it by legislation."

[47] H. R. 10453, 66th Cong., 1st Sess., p. 63, lines 11-15.

ing as enunciated in section 15 was expanded to include other elements not significant here.[48] In this form the bill was reported to the House by Mr. Esch. The report, under the headings, "Control of commission over intrastate rates" and "Power of commission to fix rates," merely restated the substance of the provisions upon those subjects.[49] But more important is the supplementary statement of Mr. Esch, commenting upon the effect of introducing the words "undue burden":

> "When by reason of the low level of the intrastate rates an undue burden is cast upon the interstate traffic the citizens and the shippers of other States are compelled to pay higher interstate freight rates than they would have had to pay had that State enacted or put into force and effect proper intrastate rates."[50]

So phrased the bill passed the House on November 17, 1919, with the full conviction, doubtless, whether justified or not, that the jurisdiction of the Interstate Commission was extended by the use of the expression, "undue burden."

(b) History in the Senate.

Of more decisive significance is the course of legislative history in the Senate. That history began, prior to the introduction of any definite legislative scheme, with the hearings before the Senate Committee on Interstate Commerce held from January 3 to

[48] *Id.*, p. 65, lines 14–21.
[49] House Report, No. 456, 66th Cong., 1st Sess., Nov. 10, 1919, p. 29.
[50] Congressional Record, Vol. 58, Part 8, Nov. 11, 1919, p. 8317.

February 21, 1919. These hearings are important, because it is evident that they furnished the basis for the bill which subsequently passed that body.

There were apparently two well-defined conceptions of the nature of existing evils and the measures requisite to procure their elimination. One line of witnesses, consisting in general of the railway executives, gave testimony by which, "in one form or another," they "insistently urged that this power (over rates) should be vested exclusively in the Federal Government."[51] Two statments deserve separate mention. In one it was said:

> "The so-called remedy against discrimination by proceedings before the Interstate Commerce Commission is wholly inadequate. It is too limited in scope to afford substantial relief. The right to judicial relief is also wholly inadequate."[52]

[51] Hearings before the Committee on Interstate Commerce, U. S. Senate, 65th Cong., 3rd Sess., Vol. I. Statement of Mr. Elmquist, pp. 746–7. Views of this character were espressed by Mr. McAdoo, Director General of Railroads (p. 39); Mr. Thomas D. Cuyler, President of the Association of Railway Executives (p. 309); Mr. S. T. Bledsoe, General Solicitor for the Santa Fe road (p. 542); Mr. Edgar J. Rich, who purported to represent the Associated Industries of Massachusetts (p. 713); Mr. S. Davies Warfield, President of the National Association of Owners of Railroad Securities (pp. 791, 809, 1148); Mr. Nathan L. Amster, President of the Investors' Protective Association (pp. 1171–1182, at p. 1179); Mr. Daniel Willard, President of the Baltimore & Ohio Railroad Company (pp. 1227–8); Mr. Howard Elliott, of the Northern Pacific Railway Company and other railroads (p. 1256); Mr. Samuel Rea, President of the Pennsylvania Railroad Company (pp. 1311–12, 1315); Mr. Theodore Prince (pp. 1371–1385, at 1373).

[52] *Id.* Statement of Mr. Bledsoe, p. 542. See also testimony of Mr. Alfred P. Thom, p. 542.

The evil of divided control having been thus emphatically set forth by railroad representatives, the concrete remedy proposed by Mr. C. W. Bunn forecast the provisions of the Esch bill as it was originally introduced, as follows:

> "As to specific amendment, I submit, amend the interstate commerce act as follows:
>
> "1. Strike out the first proviso in section 1 and say in lieu thereof—
>
> "'; and also to the extent hereinafter stated to the transportation of passengers or property wholly within any State.'
>
> "2. Add to section 13 a new paragraph * * *."[53]

The Interstate Commerce Commission, however, the one body to whose opinion the Senate would be most likely to pay heed, entertained a different conception as to the primary evil in need of remedy. Mr. Clark, the chairman of that body, appeared before the Committee, with a memorandum which represented the views of the Commission with the exception of one member. As to this he said:

> "It undertakes to state concisely certain purposes we think should be accomplished."[54]

The formal recommendations of the body were thus expressed:

> "1. Establishment of a relationship between Federal and State authorities which will eliminate the twilight zone of jurisdiction and under which a harmonious rate structure and adequate service can be secured, state and interstate. * * *."[55]

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[53] *Id.*, p. 1136. See also testimony, p. 1137.
[54] *Id.*, p. 231.
[55] *Id.*, p. 236.

This twilight zone was not to be eliminated, however, by the extinction of state power,[56] for this question and answer appear in his testimony:

> "Senator WATSON. And your only solution of that problem is that it shall be worked out by moral suasion?
> "Commissioner CLARK. Yes."[57]

Finally, he said:

> "* * * under our suggestion, Senator, if it were a question of undue prejudice against interstate commerce, our commission would have to decide it, and if it were a question that was outside of our jurisdiction, it would be left to the State, as it is at the present time."[58]

The position of the Commission, as thus stated by Mr. Clark, accords with repeated suggestions which it had made that it—

> "should be authorized to cooperate with State commissions in efforts to reconcile upon a single record the conflict between State and interstate rates."[59]

Other witnesses supported this view.[60] In view of his prominence in formulating the legislation, the lan-

[56] *Id.* See testimony, pp. 257–8, 352, 354.
[57] *Id.*, p. 353.
[58] *Id.*, p. 358.
[59] Annual Report of Interstate Commerce Commission, 1916. See Annual Report, 1917 (pp. 58–59); Annual Report, 1918. See also extracts from addresses of Mr. B. H. Meyer before the National Association of Railway Commissioners in 1916 and 1917, and resolution of that body, 1917. Hearings on H. R. 1378, pp. 1617–1649.
[60] Hearings before Committee on Interstate Commerce, U. S. Senate, 65th Cong., 3d Sess., Vol. I. See testimony of Mr. R. C. Fulbright (p. 683); Mr. G. M. Freer (p. 1189); Mr. S. H. Cowan (p. 1301).

guage of Senator Cummins in the body of a question is highly significant:

> "Do you not believe that if Congress gives the Interstate Commerce Commission the power to determine whether or not the body of the intrastate rates is not in accord with the general level of the interstate rates * * * then you have practically abolished all intrastate participation in the rates * * * ?"[61]

It was doubtless in the light of these hearings that the Senate bill was formulated and introduced by Senator Cummins under date of September 2, 1919 (S. 2906). Sections 4, 5, and 6 of the bill thus presented embodied the so-called "rule of rate-making" subsequently amplified and embodied in the bill as passed.

Section 13 of the Senate bill likewise provided for the amendment of section 13, and contained almost verbatim the language subsequently numbered paragraphs (3) and (4). But this language was followed by an emphatic declaration as to the continuance of state power:

> "Nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police powers of the several States, *including the power to make and regulate intrastate rates*, except as in this Act otherwise rovided."[62]

Subsequently, after hearing conducted on the basis of this bill, report of which is not available, a new bill embodying the amendment which had been agreed to

[61] *Id.*, p. 1192.
[62] S. 2906, 66th Cong., 1st Sess., p. 68, lines 3–7.

was introduced by Mr. Cummins on October 22, 1919. The rule of rate-making was stated with greater fullness, but the same provision was continued in section 13.

Possibly this guarded reservation of state authority may be subject to the stricture that it affects nothing that would not have resulted even in its absence, but at least it must be given this significance: the Senate very evidently did not intend to take all power to make and regulate intrastate rates. This court will not convict it of having been guilty of such a piece of solemn mummery as a declaration accompanying the complete absorption of state power, that it had taken no more of such power than it had otherwise declared. Some measure of authority was intended to be left to the states. This is made still more clear by the statement of Senator Cummins with reference to the bill under date of December 1, 1919:

> "The committee has attempted simply to express the decisions of the Supreme Court of the United States. We have not attempted to carry the authority of Congress beyond the exact point ruled by the Supreme Court in the cases to which I have referred; and the only thing we have done in the matter has been to confer upon the Interstate Commerce Commission the authority to remove the discrimination when established in a proper proceeding before that body—an authority which it does not now have."[63]

And referring to the provisions of the Esch bill, he said:

> "I may say, for the benefit of the Senate, and especially say to the Senator from Tennessee, that

[63]Congressional Record, Vol. 59, Part 1, p. 112.

the House bill originally proposed another element; that is, it proposed that we should declare that if the rates in force in any State did not sustain a fair share of the burden which the interstate carrier must bear, then the Federal authority should have the jurisdiction to take possession of the entire field and lift the rates so that the carrier should receive from intrastate business a proper share of the revenues which it must have in order to pay for maintenance and operation and a fair return upon the value of the property. That is the contention, and there is a great deal of merit in it. *We have not thought, however, that we were justified in going to that extent.* But I predict that it will not be many years before Congress will be compelled to go to that length."

And, concluding, he said:

"But I do not want it to be understood that we have yet gone, and this bill does not propose to go, to the limit of our constitutional power. It leaves with the State authorities many things which, in my judgment, if we were to exercise our full power we could withdraw from the States. *But the committee has not considered it wise to withdraw more than seemed to be absolutely necessary under existing conditions.* At any rate, Senators will now fully understand, I think the operation of the section to which I have referred."[64]

As thus phrased and explained, the bill passed the Senate on December 20, 1919.

(c) The action of the Conference Committee.

Neither the House nor the Senate bill contempl ted that the direct power of rate-making for all commerce should be vested in federal authority. Attached ot

[64] *Id.*, p. 113.

the report of Mr. Esch[65] we find a summary of the provisions for the various plans of railroad legislation, which may be taken as official. Under the title "Adequate Revenues," we find this notation as to the Senate Committee Plan, or the Cummins bill:

> "Regulation of all rates that affect interstate commerce by the Interstate Commerce Commission."

And under the Commerce Commission Plan, or Esch bill:

> "Regulation of rates by the Interstate Commerce Commission under the provisions of the Act to Regulate Commerce."

The same notation was made as to the Transportation Conference bill. Under the Railway Executives Plan, we find "Exclusive regulation of rates by the Interstate Commerce Commission," and in substance the same theory in the Warfield Plan, the Amster Plan, and the Plumb Plan.

But the bills did present to the Conference Committee a choice between a plan which was understood to create power to set aside an entire schedule of state rates, and one which quite as definitely negatived that intention. The attention of that Committee was very sharply directed to the alternatives presented.

A memorandum was submitted to the Committee on behalf of the National Association of Railway and Public Utilities Commissioners, which recited:

[65] House Report, No. 456, 66th Cong., 1st Sess., Nov. 10, 1919.

"It is provided that whenever the Interstate Commerce Commission shall investigate 'any rate, fare, charge, classification, regulation, or practice made or imposed by authority of any State * * * the Commission shall have authority * * * to make findings and orders * * * to remove * * * *any undue burden upon interstate or foreign commerce* * * * . The law of any state or the decision or order of any state authority to the contrary notwithstanding.'

"If this provision shall become law it will operate to *deprive the state Commissions of their powers to make with final effect any rate, service or other regulatory order.*

"We make this subject the first for discussion in this memorandum because we deem it of most vital importance to the state Commissions and to the people of the states whose interest they represent.

"The question involved is whether Congress desires to preserve the powers of the state Commissions or to destroy them."

The Committee on Conference adopted the language of the Senate bill. The report of the Conference Committee embodied a formal statement of the effect of the changes.[66] But when the matter was presented to the Senate, we find very definite evidence of the intention to preserve the rights of the states. On February 21, 1920 Senator Cummins made this oral statement as to the Conference Report:

"*There were numerous controversies of a vital character with respect to the sections which may properly be called amendments to the act to regulate commerce,* such as * * * *the procedure in cases of conflict between interstate and State rates* * * *. The confer-

[66]Congressional Record, Vol. 59, Part 4, p. 3264.

ence report does not depart from the Senate bill sufficiently to warrant a review."[67]

The paramount evil, then, sought to be eliminated by the legislation as finally adopted was the absence of machinery for cooperative adjustment of conflicts of jurisdiction over the subject of rates between state and federal authority.

B. Assuming that power was given to bring an entire schedule of state rates up to the level of interstate rates, because of "revenue discrimination," jurisdiction was improperly and prematurely exercised in the present case.

1. Nature of Commission's action considered.

Let it be assumed that "ambushed in obscurity" there lurked within the phrasing of the act the intention to displace all state authority, and that the Commission was justified in "building up indirectly and by implication a power which is not in terms granted."[68] Clearly, there is no warrant for the procedure as herein conducted, unless the industrious reiteration by Congress of the continuing vitality of state authority is to be wholly brushed aside. We must conclude that there has been elaborated and added to our scheme of government a plan of initial state action in the exercise of unqualified power to be succeeded by a full and complete revision by an administrative agency of the federal government. The

[67] *Id.*, pp. 3326–7.
[68] *Int. Com. Comm. v. Railway Company*, 167 U. S. 479, 509.

validity of the construction that results in this unique situation is not to be denied upon the score that the argument involves the paradox set forth by this court in *Northern Pacific Railway Co. v. N. D.*, 250 U. S. 135, 149, "that because the statute made a fundamental change it must be so interpreted as to prevent that change from becoming effective." Here the asserted result has been brought about "by clear expression" absent from the Railroad Act and from the related Wire Control Act construed in the *Telephone Case*.[69]

We are not at liberty to treat the assertions of Congress as a mere idle verbal ceremony, reaffirming power coincident with its denial. The terms of the act negative the idea that the function to be exercised by the states is restricted to the perfunctory and formal routine of automatically approving what the Interstate Commerce Commission has seen fit to do.

The Interstate Commerce Commission at first clearly so construed the law. It issued a circular under date of March 22, 1920, wherein it is said:

> "The jurisdiction over intrastate rates, fares, charges, classifications, regulations, or practices, passed to the state regulating authorities at 12:01 A. M., March 1, 1920."

Subsequently, in Ex Parte 74, it confined its action to interstate rates.

It is useless to scan the books for a direct enunciation of the principles that would condition the exercise of such anomalous administrative authority heretofore unknown to the scheme of American government.

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[69] *Dakota Central Tel. Co. v. S. D. ex rel. Payne*, 250 U. S 163, 187.

The nearest approach to guidance lies in an expanded application of the theory which underlay preexisting procedure for the removal of discrimination. The language of a concurring opinion in *Eastern Texas R. Co. v. Railroad Commission*, 242 Fed. 300, 307–8, suggests the considerations which must control:

> "When the Interstate Commerce Commission acts with reference to such a matter, it makes, or should make, the same character of investigation and the same character of determination that would be made by a court if a carrier charging the intrastate and the interstate rates were prosecuted for a violation of the Interstate Commerce Commission Act. Its action would be more nearly judicial than legislative."

The criteria enunciated by this court when state action has been challenged as contravening the Fourteenth Amendment are therefore apposite.

The Commission appears to have been uncertain as to the precise nature of the power which had come into being and was exercised by it. We find the following statements, some of which have been earlier noted:

> " * * * the decisive factor is whether the rates under consideration injuriously affect interstate commerce. It is no answer to this to say that if this conclusion be admitted it may have the effect of completely displacing state jurisdiction over state commerce."[70]

And again:

> "But in every case which puts in question intrastate rates, the decisive factor is whether or not they affect interstate commerce injuriously to a con-

[70] 59 I. C. C. 292; R. p. 96.

siderable extent. If they do they are brought under our jurisdiction and made subject to our control, even although the whole rate structure of a state should be involved."[71]

Apparently it wavered in this belief, for it said:

"This should not be construed as holding that jurisdiction over intrastate rates and fares has been taken away from the states and reposed in us. We find nothing in the law to indicate that such was the intent of Congress."[72]

In the next sentence it reverted to its earlier position.

"But Congress has directed that we allow rates that will yield in the aggregate a return of 5½ or 6 per cent upon the value of the railway property in each of the groups."[73]

Referring to the lower basis of intrastate fares in New York, it was contended:

"* * * to that extent the declared purpose of Congress is defeated by a preferential basis of rates and fares maintained by authority of the state of New York."[74]

So far it appears that a jurisdiction directed solely to the remedy of supposed inadequacy of state rates and resulting burden upon interstate commerce was being exercised.

Indications are not wanting that the Commission conceived it lay within the scope of its power to pass upon the reasonableness of state rates. To be sure, the order in Ex Parte 74, which purports to have been

[71] 59 I. C. C. 292; R. p. 97.
[72] 59 I. C. C. 293-4; R. p. 98.
[73] 59 I. C. C. 294; R. p. 98.
[74] 59 I. C. C. 294; R. p. 99.

entered "in the exercise of its power to prescribe just and reasonable rates" completely fails anywhere to assert that the rates put in force for passenger traffic are reasonable. This omission corresponds with the absence from the report of all those elements that have heretofore been considered fundamental in determining the reasonableness of passenger rates, notably the segregation of the property, earnings, and expense of freight from passenger business.

When it came to the exercise of jurisdiction in cases involving the state rates, the Commission appeared to have thought it necessary to bolster up and support its order in Ex Parte 74 by a purely collateral finding as to the reasonableness of the rates established thereby. So we find it asserted:

> "Following the New York and Illinois cases, and upon this record, * * * we are of opinion and find that the increases made * * * under Ex Parte 74 * * * result in reasonable passenger fares."[75]

As already noted in the Illinois case, it urged that discrimination arises—

> "If, without good reason, the fares within a state are lower than those authorized and established for interstate application."[76]

Finally, this formal statement is made:

> "We find that there are no conditions within Illinois justifying the maintenance of lower intrastate passenger fares therein than the fares

[75] 59 I. C. C. 396; R. p. 18. See also New York decision; R. p. 102.
[76] 59 I. C. C. 365; R. p. 10.

71

applicable to the interstate transportation of passengers to, from or through the state."[77]

The Commission in effect thus grounded its action upon both the unproductivity and the unreasonableness of existing state rates. Testing the order from either standpoint, it was plainly premature.

2. So far as the order purported to pass upon the adequacy of rates, it was premature, because of the absence of a timely test thereof.

Under the revenue discrimination theory, the reasonableness of state rates is not brought in issue. For, as said by this court in *American Express Co. v. Caldwell*, 244 U. S. 617, at 624,

> " * * * the finding that discrimination exists and that the interstate rates are reasonable does not necessarily imply a finding that the intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve unjust discrimination. * * * Proceedings to remove unjust discrimination are aimed directly only at the *relation of rates*."

There is no direct finding in the Wisconsin report or in the other reports before the court that the *state rates are unreasonable*. In fact, as will be elsewhere set forth, the bill of complaint does not effectively challenge the reasonableness of the statutory Wisconsin rate. Whether prior to the present controversy, the two-cent rate was the prescribed rate in the state of Wisconsin has never been deter-

[77] 59 I. C. C. 365; R. p. 11.

mined. It has been urged with much force that the provisions of section 208 (a) of the Transportation Act contemplate the continuance of the rate prescribed by the Director General until subsequently changed by affirmative action of the state, and that hence, the only valid rate in Wisconsin was that of 3 cents per mile. Such was the effect of the decision in *Public Service Commission, Second District v. New York Central R. Co.*, 183 N. Y. S. 799. This rate has been continued in force in the state of Wisconsin by order of the United States District Court for the Eastern District of that state.[78] Whether a rate of 3.6 cents per mile will produce more revenue when applied to intrastate business than would a rate of 3 cents per mile is at best a debatable question. It may in fact operate to lessen the revenue of the carrier from its passenger business.

The Commission itself appears to have been wholly in the dark as to what would be the result of its own action in fixing the interstate rate. It said:

> "The inadequacy of the data furnished by the carriers increases substantially the difficulty of forecasting the results of operation for the two-year period."[79]

And noted:

> "That the carriers contend that it is uncertain whether an increase in the general level of passenger fares will yield increased revenue proportionate to the increase in the fare level, because of possible reduction in travel following a material increase in fare."[80]

[78] 59 I. C. C. 393; R. p. 16.
[79] Ex Parte 74, 58 I. C. C. 231; R. p. 66.
[80] Ex Parte 74, 58 I. C. C. 241; R. p. 76.

And set forth its helplessness to determine future results:

> "Most of the factors with which we are dealing are constantly changing. It is impossible to forecast with any degree of certainty what the volume of traffic will be."[81]

Commissioner Eastman, in his concurring opinion, put the matter in a nutshell:

> "What revenue will actually be produced no one can tell."[82]

The proceedings were plainly not an attempt at scientific rate making. As has been noted the Commission said in the New York report that the needs of the carriers were such as could "not be permitted to await the consideration in detail of individual fares, charges, and rates."[83]

But this court has never sanctioned a practice which involved such breathless urgency in striking down the law of a sovereign state. On the contrary, we find that in the realm of public utility law, no principle seems more thoroughly settled than that which enjoins upon a carrier or other utility the necessity of subjecting prescribed rates "to the test of practical experience before attacking them in the courts."

Lincoln Gas Co. v. Lincoln, 250 U. S. 256, 262. See also 268.
Knoxville v. Knoxville Water Co., 212 U. S. 1, 16, 18.
Willcox v. Cons. Gas Co., 212 U. S. 19, 54.

[81]Ex Parte 74, 58 I. C. C. 255–6; R. p. 89.
[82]Ex Parte 74, 58 I. C. C. 258; R. p. 92.
[83]59 I. C. C. 294; R. p. 99.

Nor are we wholly wanting in guidance as to the period of time deemed needful to make such required test. In the case of *Municipal Gas Co. v. Public Service Commission*, 225 N. Y. 89, it was said:

> "It will seldom be important that rates have been inadequate for a day or a week or a month. Fleeting losses may be suffered, and yet the balance sheet may show a profit. Prolong the loss, however, for a year, and you may reach and cross the danger line."

In *Janvrin v. Revere Water Co.*, 171 Mass. 514, 17 L. N. S. 319, 55 N. E. 381, at 383, the Supreme Court of Massachusetts speaking through Chief Justice Holmes, sanctioned the continuance of a rate in force for five years, saying:

> " * * * if the legislature should say that in these cases five years was a reasonable time, we could not say that it was wrong."

And upon the authority of this decision, the court in *Trustees of Saratoga Springs v. Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. N. S. 713, 725, said:

> "We have no difficulty in upholding the provision that the rate shall remain as established for the term of three years."

If a timely test be requisite, the Commission's action rests upon the flimsiest footing.

The increased rates, fares, and charges established pursuant to Ex Parte 74 became effective August 26, 1920.[84] Immediately thereafter, the carriers filed

[84] 59 I. C. C. 392; R. p. 15.

their petition. The proceedings were submitted November 12, 1920, and decided by the Commission November 27, 1920. So that, at the time the order increasing the state fares was entered, the interstate rates had been in effect three months and one day, and it is safe to assume that the testimony in the case was all directed to a period when their operation was much more limited. The testimony suggests conditions from August 1 to 14th, and during the month of September, 1920.[86] Under these circumstances, no factor was before the Commission except of the most speculative character upon which it might arrive at the conclusion that an increase of the rates, which it had established by Ex Parte 74, would become necessary. So far as an actual test was concerned, those rates might have been ample to produce 5½ to 6 per cent upon the aggregate value of railway property—might, indeed, far exceed that amount. There was not a scintilla of proof before the Commission that it had become, or ever would become, necessary to add one cent to the return arising from such rates.

It was said in *Lehigh Valley R. Co. v. Rainey*, 112 Fed. 487:

> "The mere making or offering of a discriminating rate under which it is not shown that any shipment was ever made constitutes no legal injury to a shipper who is charged a higher rate."

So, in the present case, it may be asserted that the mere existence of a lower state rate, it not having been shown that such rate will necessitate resort to interstate commerce for additional revenue, consti-

[86] 59 I. C. C. 391; R. p. 11.
[86] 59 I. C. C. 391; R. p. 17.

tutes no discrimination against that commerce. Nor is it an answer to say that, if rates established under Ex Parte 74 produce more than the desired revenue or all the desired revenue, it is apparent that they are too high and must be reduced, because burden upon interstate commerce has resulted. The proceedings of the Commission are to be tested by the results of actual experience. Hypothesis, conjecture, and theory do not supply the necessity for a demonstration that discrimination or burden from state action has in fact resulted.

3. So far as it involved the reasonableness of state rates, the order was premature, because ample administrative machinery existing under state law had not been exhausted prior to the institution of the proceedings before the Interstate Commerce Commission.

The Interstate Commerce Commission formally found that there were no conditions within the state of Illinois justifying the maintenance of lower intrastate passenger fares. That decision was followed in the Wisconsin case. So far as the commission took this factor into account it did nothing more nor less than exercise the power to review the reasonableness or adequacy of rates imposed by state authority—the same function in essence and effect called into play when a court of equity passes upon the issue of confiscation raised under the Fourteenth Amendment. If analogous rules control the exercise of the Com-

mission's jurisdiction, the infirmities in the present record are apparent, because "of the existence of ample and efficient administrative remedies under the state law and the failure to resort to them."

Mellon v. McCafferty, 239 U. S. 134, 136.
Wisconsin-Minnesota Light & Power Co. v. Railroad Commission of Wisconsin, 267 Fed. 711.
Cases cited, this brief, p. 26, *supra*.

The existence of such administrative remedy under Wisconsin law appears from the record herein:

> "The Railroad Commission of Wisconsin was created by an act of the legislature of 1905 and by that act was given jurisdiction to fix and determine reasonable passenger fares on intrastate traffic on railroads in the State of Wisconsin."[87]

The carrier proceeded upon the theory that the Railroad Commission of Wisconsin still possessed power and authority to pass upon their rates, and made application to that body—

[87] 59 I. C. C. 392; R. p. 15, quoting opinion of Wisconsin Commission. Ch. 362, Laws 1905, contains these provisions:
Sec. 14: "Whenever, upon an investigation made under the provisions of this act, the commission shall find *any* existing rate or rates, fares, charges or classifications, * * * or any regulation or practice whatsoever * * * are unreasonable * * * it shall determine and by order fix a reasonable rate, fare, charge, classification * * * and it shall determine and by order fix a reasonable regulation * * * ." (See sec. 1797–14, Stats. 1919.)
Sec. 15: "All rates, fares, charges, classifications and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and service prescribed by the commission shall be in force and shall be prima facie reasonable, until finally found otherwise in an action brought for that purpose pursuant to the provisions of section 1797–16." (See sec. 1797–15, Wis. Stats., 1919.)

> "for permission to make increases in their intrastate rates, fares, and charges similar to those which should be authorized * * * on interstate traffic."[88]

It is true, of course, that such application was not made upon the theory that the Commission might exercise any independent judgment in the premises upon the merits of the application. It was assumed that its action was restricted to the unquestioning approval of such action as might be taken by the Interstate Commerce Commission.

But such application presupposed that the Railroad Commission was possessed of jurisdiction, whatever its character might be to pass upon the validity of the proposed changes in rates. The Commission denied the application, stating in its opinion:

> "Since the passage of the two cent fare act, this Commission has been without jurisdiction over passenger fares on the lines specified in excess of two cents. In our opinion, we are still without such jurisdiction and cannot approve any tariffs in violation of that act.
> * * *
> "The sole question decided here is the jurisdiction of the Commission. The application of carriers in this respect is denied."[89]

The Two-Cent Fare Act, thus referred to, is set forth in the record.[90] While in force it merely operated to

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[88]59 I. C. C. 392; R. p. 44.
[89]59 I. C. C. 392; R. p. 45.
[90]Sec. 1798*a* provides: "No corporation operating a railroad in this state, the gross receipts of which are or exceed three thousand five hundred dollars per mile per annum, shall demand, collect or receive a greater compensation for

create an exception to the general jurisdiction of the Commission. If the law was in fact void, then plainly the Commission would seem to have been reinvested with jurisdiction when the invalidity occurred."

The rule is elementary, as announced in *Smith v. Hoyt*, 14 Wis. 273:

> "Where a statute merely excepts a particular class of cases from the provisions of a previously existing general law which continues to be in force, the repeal of the excepting statute operates to bring such cases again under the general law."

Repeal of a statute, judicial declaration of its invalidity, or invalidity in fact must all operate to produce the same result, for, as was said in *Norton v. Shelby Co.*, 118 U. S. 425, at 442:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal comtemplation, as inoperative as though it had never been passed."
>
> *Bonnett v. Vallier*, 136 Wis. 193, 200.
> *Hirsch v. Block*, 267 Fed. 614.
> Lewis-Sutherland, *Statutory Construction*, Sec. 245, Vol. I, p. 458.
> 25 *R. C. L.*, sec. 167, p. 917.

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the transportation of persons than two cents per mile; and every such corporation shall at its ticket stations within this state on its lines of road, sell tickets at a price not to exceed two cents per mile, but no such corporation shall be compelled to accept a single fare of less than five cents." R. p. 45.

[9]The situation is to be distinguished from that which arose in New York and was considered in the cases of *People v. Public Service Commission*, 120 N. E. 132, and *Morrell v. Brooklyn Borough Gas Co.*, 181 N. Y. S. 651, for the New York statute gave the Commission power to fix a rate "not exceeding that fixed by statute."

Whether the invalidity of the Two-Cent Fare Law, upon the ground of its confiscatory character, was pressed upon the Commission is not apparent, but without doubt it was proper for that body, being essentially of an administrative character, to have refused to act, in the presence of a statute in terms creating an exception to its jurisdiction. But if the theory of the carrier was correct, when it applied to that jurisdiction there arose in its favor immediately, upon the refusal of the Commission to act, the right to appeal to the original jurisdiction of the Supreme Court of Wisconsin, and thus compel the Commission to discharge its statutory duties.

Income Tax Cases, 148 Wis. 156, 189.
State ex rel. Husting v. Board of Canvassers, 159 Wis. 216.
Kansas City Ry. v. I. C. C., 252 U. S. 178.
Interstate Commerce Commission v. U. S., 224 U. S. 474.
State ex rel. Ingold v. Mayor, 170 Wis. 133, and cases cited at page 136.
W., J. & S. R. Co. v. Pub. Util. Bd., 87 N. J. L. 170, 178.
Atl. Coast L. R. Co. v. R. R. Comm. of S. C., 72 S. E. 18, 22.

Save for the fact that the remedy in the present case is mandamus, while a right of appeal arose in the case of *Boston & Maine R. v. Niles*, 218 Fed. 944, that case involved a situation directly parallel to the present one, and the decision therein is controlling. The language of the court at pages 947-8 is pertinent:

"This case involves the single question of the validity of a state statute, which has not yet been passed upon by the Supreme Court of the state. The question has been at issue before the local

Public Service Commission of New Hampshire, a commission which is comparatively new, and one whose powers have not been defined by the state courts. Upon certain proceedings, that Commission based its action upon the statute in question, accepting it as binding, and as establishing certain rights in respect to passenger railroad tariff rates in New Hampshire. * * *

" * * * The Boston & Maine Railroad filed a schedule of rates, acting upon the idea that such rates should become operative, notwithstanding the statute in question assumed to establish a maximum. The Commission accepted the statute as controlling contrary to the contention of the railroad. Thereupon the railroad petitioned for a rehearing, expressly putting in issue the question of the constitutionality of the act. The Commission exercising its judicial function, denied the motion for rehearing. The statute which created the Commission, and also put the limitation upon the rates, broadly provides for an appeal to the Supreme Court of the state.

"We have no hesitation in saying that we think the question of the validity of the New Hampshire statute was put in issue before the state tribunals through the initiative of the Boston & Maine Railroad, and that the railroad having first sought relief, through the instrumentalities of the state tribunals, from what it asserts is an oppression resulting from a state law which it claims contravenes the federal Constitution, that, before invoking federal aid, it should exhaust its opportunities to have the supposed wrong righted there."

That it was incumbent upon the carrier to exhaust the remedy, having once invoked it, is apparent from cases already cited, and sustained by the following additioaal citations:

Manufacturers' Light & Heat Co. v. Ott, 215 Fed. 940, 950.

Had the carrier promptly instituted such proceeding, all question as to the power of the Railroad Commission of Wisconsin to function would have been disposed of long before the present time, and had a ruling been made that it was without power to proceed, then, and not until then, would resort to the Interstate Commerce Commission have been an appropriate remedy.

That the Interstate Commerce Commission is peculiarly under obligation to insist upon full and complete exhaustion of administrative remedy is further emphasized by the provisions of paragraph (3) of section 13, already discussed.

C. So far as the order purports to remove prejudice and discrimination against persons or localities, "it has no definite field of operation and leaves uncertain the territory and points to which it applies."

1. The order was entered on a different and erroneous theory.

In the lower court it was urged, in reliance upon *Illinois Central R. Co. v. Public Utility Commission*, 245 U. S. 493, at 508, that the Interstate Commerce Commission had power prior to 1920 to change an entire schedule of state rates, to remove unjust prejudice and disadvantage against localities and persons in interstate commerce. The correctness of this conclusion as to the Commission's power may be

conceded, but it by no means follows that the present order can be sustained.

The language of this court in *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 133, at 149, adapted, completely rules the situation:

> "While it is true that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely "of prejudice against localities and persons traveling in interstate commerce," considered as a whole in the light of the condition of the record to which we have referred it clearly results that it was based upon the belief by the Commission that it had the right under the law" to remove an entire schedule of state rates, upon the sole ground that such rates were upon a different level, and hence unjustly discriminatory against interstate commerce.

The order thus being the result of an erroneous conception of power, it cannot be saved, because of isolated expressions indicating that considerations which might have contributed to the making of an order within jurisdiction were before the Commission. Illegal intent so far pervades the whole proceeding that it cannot be held that the exertion of a lawful power separable therefrom can be found.

2. The insufficiency of the order as to localities.

The court, in the opinion just noted, based its conclusion in part upon—

> "the obvious impression as to the nature and character of the power exerted given by the very face

> of the opinion of the Commission * * * shown by the syllabi to the official report of the opinion * * *."[92]

The syllabus of the present case follows:

> "Certain fares and charges required by state authority to be maintained by the respondents within the state of Wisconsin found to be lower than the corresponding interstate fares and charges authorized by the order in Ex Parte 74, *Increased Rates, 1920*, 58 I. C. C., 220, and to be unduly prejudicial to interstate passengers and unjustly discriminatory against interstate commerce."[93]

"The obvious impression as to the nature and character of the power exerted," thus made, is that the order was not concerned with the matter of discrimination against localities at all. The order itself is directed to the removal of "undue prejudice, undue preference and advantage, and unjust discrimination, found in said report to exist."[94] There is nothing in the formal conclusion of the report finding discrimination as against any locality. This corresponds with the vagueness of the recitals in the body of the report or findings as to discrimination against localities. We find it stated:

> "The lower Wisconsin state basis is *said* to affect localities outside the state."[95]

Four sets of points are mentioned: Duluth, Minnesota, and Superior, Wisconsin; Marinette, Wisconsin,

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[92]219 U. S. 433, 450.

[93]Interstate Commerce Commission, No. 11763, Wisconsin Passenger Fares, 59 I. C. C. 391; R. p. 41.

[94]R. p. 50.

[95]59 I. C. C. 393; R. p. 46.

and Menominee, Michigan; Hurley, Wisconsin, and Ironwood, Michigan; St. Paul, Minnesota, and Hudson, Wisconsin, and very general reference is made "to other border points." The evidence of the extent of such discriminations is limited to a recital of the sale of tickets during a specified interval from these border points to twenty-three unnamed stations in Wisconsin. There is nothing to indicate the location of any of these points, or the volume of traffic between them, and thus the order must fall under the same condemnation that was pronounced in *Illinois Central R. Co. v. Public Utilities Commission*, 245 U. S. 493, 509:

> "The uncertainty arises out of a failure to designate with appropriate precision the territory or points to and from which the intrastate rates must or may be readjusted, and this omission accords with the absence from the reports of any *finding showing definitely the territory or points where those rates operate prejudicially against the interstate traffic which the order is intended to protect.*" (Italics ours.)
>
> *American Express Co. v. Caldwell*, 244 U. S. 617, 625.

There being in the present case no finding as to the actual extent of traffic from the border points mentioned to towns within the state, no specification as to what these towns are, and no indication as to the actual extent to which the effects of the alleged discrimination are felt, as in the Illinois case "the order restrained by the reference to the" report must fail.

Nor can its deficiency in respect to the indefiniteness of its field of operation be cured by the concluding paragraph of the findings:

"These findings are without prejudice to the right of the authorities of the state of Wisconsin or of any other party in interest to apply in the proper manner for a modification of our findings and order as to any specified intrastate fares or charges on the ground that the latter are not related to the interstate fares or charges in such a way as to contravene the provisions of the interstate commerce act."[98]

The impropriety of entering an order unlimited in its scope, on the theory that the court will so restrict its application as to make it valid, is evidenced by citations which follow:

In *U. S. v. Reese*, 92 U. S. 214, at 221, it was said:

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would to some extent substitute the judicial for the legislative department of the government."

Trade Mark Cases, 100 U. S. 82.
James v. Bowman, 190 U. S. 127.
U. S. v. Ju Toy, 198 U. S. 253, 262.
Ill. Cent. Ry. Co. v. McKendree, 203 U. S. 514.
Butts v. Merchants Transfer Co., 230 U. S. 126.

While these cases relate primarily to the invalidity of legislative acts so drawn as to apply indiscriminately to the two classes of commerce, as was said in *Ill. Cent. R. R. Co. v. Public Utilities Commission*, 245 U. S. 293, 510:

"This being true of an act of Congress, it is obvious that an order of a subordinate agency, such as the

[98]59 I. C. C. 397; R. p. 19.

Commission, should not be given precedence over a state rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty."

3. The insufficiency of the order as to persons

The language of the report and findings completely excludes the idea that "any particular person," in the words of section 3 of the act, has suffered prejudice or disadvantage in competition with any other person, and while it is true that under the terms of paragraph (3) of section 13 an investigation may now be instituted upon petition of the carrier, the ground for the exercise of jurisdiction must continue the same. In other words, there must be a finding that some particular person has suffered injury. There being no such finding, we may assume that the broad language of the report as to undue prejudice to persons traveling in interstate commerce must rest upon the provisions of section 2 of the act.[97]

The assertion has elsewhere been broadly made that the provisions of section 2, standing alone, furnish a

[97]Section 2 provides: "That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful."

complete warrant for the action taken by the Commission. The recital in the report—

> "The state passenger, paying the lower rate, rides on the same train, in the same car, and perhaps in the same seat, with the interstate passenger who pays the higher rate."[98]

coupled with the formal conclusion, in the language of section 2, that

> "the transportation services in each instance are performed by the carriers under substantially similar circumstances and conditions,"[99]

plainly suggests that the order is formulated upon the theory that this section applies.

The following considerations suffice to demonstrate that section 2 does not control the situation. This section contains its own special definition of "discrimination," and the discrimination forbidden is such as results from "any special rate, rebate, drawback, or other device." This language was aimed at the correction of a well-defined, well-understood evil, thus characterized by the Senate Committee one Interstate Commerce:

> "Individual favoritism is the greatest evil chargeable against the management of the transportation system of the United States."[100]

And further:

> "The methods by means of which personal favoritism may be indulged in are limited in variety only by the ingenuity and inventive

[98]59 I. C. C. 393; R. p. 16.
[99]59 I. C. C. 397; R. p. 19.
[100]Senate Report No. 46, 49th Cong., 1st Sess., p. 188.

capacity of the railroad officials. Its most common manifestation is in the form of special contracts, special rates, rebates, underbilling, and other secret devices for evading the schedule rates."[101]

Of course, no special rate, rebate, or other similar device is involved in the present proceeding.[102] Hence, no reliance may be placed upon this section.

That it applies is negatived by other phrasing. Condemnation is directed to the use of the rebate "in the transportation of passengers or property subject to the provisions of this act," by which greater or less compensation is exacted than "in the transportation of a *like kind* of traffic." It is thus apparent that the situations drawn in contrast relate purely to practices in interstate commerce.

But were it assumed that the section applied as between a charge in interstate commerce and one in intrastate commerce, no case within the section has

[101] *Id.*, p. 190.

[102] Congressional Record, Vol. 17, Part 1, 49th Cong., 1st Sess., p. 3472. See explanatory statement of Senator Cullom, where as to sec. 2 he says: "The second section strikes at the evil of which the most serious complaint is made, and made justly, by prohibiting and declaring unlawful every variety of personal favoritism or unjust discrimination between persons." And as to sec. 3 he says that it "contains a general prohibition of every variety of unjust discrimination." See also statements of Senator Miller (p. 3727); Senator Brown (pp. 3831–2); Senator Cullom (3867), "the second is against discrimination between persons and the third is against discrimination between places as well as persons"; Senator Spooner (p. 4180) "That section as it is drawn to my mind strikes as perfectly as language can against that great curse of transportation wherever it exists mere favoritism".

See also statements of Mr. Reagan (p. 7281) and Mr. O'Ferrall (p. 7291) in the House of Representatives.

been established. For it is settled law that two passengers, one transported between two local points and the other conveyed between those points in the course of a longer journey, are not receiving "a like and contemporaneous service" "under substantially similar circumstances and conditions."

Union Pac. Ry. v. U. S., 117 U. S. 355.
Interstate Commerce Commission v. B. & O. R., 145 U. S. 263.
Tex. & Pac. Ry. v. Int. Com. Comm., 162 U. S. 197, 232.

As stated in the last case, the second section of our act was modeled upon section 90 of the English Railway Clauses Consolidation Act.[103] Numerous English decisions construing the act are likewise cited, from which it appears that the contrasted situations must involve journeys between the same points of arrival and departure.

Such is the logic of *Memphis Merchants Exchange et al. v. I. C. C. R. R. Co.*, 43 I. C. C. 378, 387.

But in any event, relative density of traffic and earning per mile within the state of Wisconsin from intrastate traffic are considerations that might entitle the intrastate passenger to a lower rate. The language of this court in *Smyth v. Ames*, *supra*, at page 540, is extremely pertinent:

"* * * * the roads may not discriminate against the people of any one State, but they are not necessarily bound to give absolutely the same rates to the people of all the States; for the kind and amount of business and the cost thereof are factors which determine largely the question of rates, and these

[103] 12 Chitty's Statutes, p. 68.

vary in the several States. The volume of business in one State may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both States might result in one in great injustice, while in the other it would only be reasonable and fair."

A uniform rate means a uniform return. The claim of "revenue discrimination" is grounded upon the proposition that a carrier is entitled to the like rate of earnings from both classes of commerce. The present contention merely asserts the right of the passenger to travel in such commerce at identical rates which is the mere converse of the argument which rests upon the so-called revenue discrimination. As we have seen, the carrier has the independent and unrelated right to a reasonable rate of return in both classes of commerce separately considered, and the passenger has the reciprocal right, equally unrelated, to travel in either class of commerce at and for a reasonable rate of fare. He becomes entitled to uniformity of fare only if a unity of control be first established. This argument thus also begs the question, until such unified control be established.

II

THE BILL OF COMPLAINT COMPLETELY FAILS TO MAKE A *prima facie* SHOWING AS TO THE INVALIDITY OF THE WISCONSIN STATUTES, UPON THE GROUND THAT THEY VIOLATE THE FOURTEENTH AMENDMENT.

The allegations of the bill of complaint apart from those which are concerned with conflict with the report and order of the Interstate Commerce Commission, as to the invalidity of the Wisconsin statutes, are as follows:

> "Twelfth. Plaintiff further shows that said Two-Cent Fare Law of Wisconsin and said Section 1797-27 of the Railroad Commission Law of Wisconsin are each and all void, because of the enormous penalties attendant upon a disobedience of said statutes which deny to this plaintiff the equal protection of the laws and deprive it of its property without due process of law and in violation of the Constitution of the United States, and particularly the Fourteenth Amendment thereof."[104]

The penal provisions referred to, within the rule of *St. Louis, Iron Mountain & So. Ry. Co. v. Williams*, 251 U. S. 63, are doubtless valid. If not, they are so plainly separable under the rule of *Minnesota Rate Cases*, 230 U. S. 352, at 380, and cases cited, that this phase of the complaint may be entirely laid out of account.

There are no detailed allegations whatsoever as to the value of the carrier's property located in Wisconsin, its earnings therefrom, or its expense of

[104]R. p. 8.

operation within the state. Hence, if the complaint is to be construed as seeking to set forth a cause of action upon the ground of confiscation, it must be treated as wholly insufficient, as against the motion to dismiss, and wholly insufficient to sustain the interlocutory injunction granted. The rule is too well settled to require more than a reference to the following citations:

10 *Encyc. Pl. & Pr.* 923.
10 *C. J.*, sec. 684, p. 437.
22 Cyc. 925.
Missouri Rate Cases, 230 U. S. 474, 501.
L. & N. R. Co. v. Garrett, 231 U. S. 298, 308–9, 315.
Portland R. L. & P. Co. v. Portland, 200 Fed. 890, 892.
Southern Pac. Co. v. Campbell, 189 Fed. 182, 186–7.
Southern Pac. Co. v. Campbell, 230 U. S. 537, 549.
Southern Pac. R. Co. v. Railroad Commission, 193 Fed. 699, 703–5.
Oregon R. & N. Co. v. Campbell, 173 Fed. 957, 991.
Central of Ga. Ry. Co. v. McLendon, 157 Fed. 961.
Morris v. Bean, 123 Fed. 618, h. n. 4.
C. M. & St. P. Ry. Co. v. Tompkins, 176 U. S. 167, 173–4.
Burlington, C. R. & N. Ry. Co. v. Dey, 18 N. W. 98, 106.

No cause of action has been set forth in the bill of complaint. This is equally true whether viewed from the aspect of protection prayed for in the exercise of rights alleged to accrue under the order of the Interstate Commerce Commission, or from the stand-

point of the supposed unconstitutionality of the state statutes, whose enforcement is sought to be restrained. It necessarily follows that the action of the court in making the order for an interlocutory injunction must be reversed.

All of which is respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1920

No. 694

RAILROAD COMMISSION OF WISCONSIN, *et al*,
Appellants,
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellee.
} In Equity

SUPPLEMENTAL AND REPLY BRIEF OF APPELLANTS

No departure from the argument heretofore presented to the court is contemplated by the present brief, except in a minor particular to be hereinafter noted. The effort is to restate the position taken in the light of a series of related decisions made by the Interstate Commerce Commission subsequent to the entry of the Wisconsin order and in the light of judicial opinions sustaining certain orders of the commission; and to reply to the argument of opposing counsel made orally and in briefs on file.

RESTATEMENT OF APPELLANTS' POSITION

Appellants' position taken upon the prior argument and adhered to now may be very briefly stated in language taken from decisions of this court.

"* * * every substantial controversy which the case presents will be disposed of by determining what was the character of the order made by the Commission; that is to say, what was the power which that body exerted in making the order in question."[1]

The vice of the Commission's order lies in the fact that under the guise of removing discrimination it aimed to increase the production of revenue.

"* * * Proceedings to remove unjust discrimination are aimed directly only at the *relation of rates*.[2] If in such a proceeding an unreasonable rate is uncovered and that rate made reasonable, it is done as a means to the end of removing discrimination. The correction is an incident merely."[3]

The incident thus described was the end of the proceeding which resulted in the order now under attack before this court. No unjust discrimination, "except by an artificial use of words,"[4] was found by the Commission, with such definiteness at least as is required by well settled rules of law. No serious attempt was made to show such discrimination within the legal meaning of the term:

"any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic."[5]

The avowed aim of the Interstate Commerce Commission was the correction of rates deemed unreason-

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[1] *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 437.

[2] *Italics in all cases are ours.*

[3] *American Express Co. v. Caldwell*, 244 U. S. 617, 624.

[4] *Interstate Commerce Commission v. N. P. Ry. Co.*, 216 U. S. 538, 545.

[5] *Houston & Texas Ry. v. United States*, 234 U. S. 342, 355.

able by it because they did not correspond with the standard of production set up for the regulation of interstate commerce. This was an object beyond the scope of the Commission's power and the attempt to attain that result made its order void.

Even if the court should find that removal of discrimination, within the meaning of the law, was one of the purposes of the order, that purpose was "so intermingled with other" considerations as "to make it impossible to separate the two,"[6] and hence the order is both "for a lawful and for an unlawful purpose." Its scope being "obviously and largely beyond what is needed"[7] for the removal of any discrimination actually shown, the order must be held a nullity.

ARGUMENT

THE ORDER WAS MADE BY THE INTERSTATE COMMERCE COMMISSION UPON THE THEORY THAT IT POSSESSED THE POWER TO INCREASE INTRASTATE PASSENGER RATES FOR THE PURPOSE OF ADDING TO THE REVENUE WHICH AN INTERSTATE CARRIER WOULD DERIVE FROM SUCH RATES. WANTING SUCH POWER, THE ORDER IN QUESTION IS VOID.

A. The substance of the power exercised, and not its shadow, determines the validity of an order of the Interstate Commerce Commission.

> "The substance, and not the shadow, determines the validity of the exercise of the power."[8]

This rule is but an application of the doctrine frequently invoked by this court, in passing upon the

[6] *Foote v. Md.*, 232 U. S. 494, 503.
[7] *Id.*, 503–504. See also *Pure Oil Co. v. Minn.*, 248 U. S. 158, 162.
[8] *Int. Com. Comm. v. Illinois C. R. Co.*, 215 U. S. 452, 470. *Int. Com. Comm. v. Union P. R. Co.*, 222 U. S. 541, 547.

validity of both state and federal statutes. The court has said:

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."[9]
>
> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority."[10]
>
> "The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for."[11]
>
> "* * * this court will assume the duty of determining for itself whether the statute before it is a genuine exercise of an acknowledged state power."[12]

The court indicates that it would not sustain an inspection law which was really "a disguised revenue measure."[13]

> "* * * the contention is, that although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct" an unjust discrimination against interstate commerce, "yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority, but was based upon the assumption by that body of the possession of a power not conferred by law,

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[9] *Henderson v. Wickham*, 92 U. S. 259, 268; *Hannibal & St. Joseph R. Co. v. Husen*, 95 U. S. 465, 472; *Reid v. Colo.*, 187 U. S. 137, 150; *Hammer v. Dagenhart*, 247 U. S. 251, 275.

[10] *Mugler v. Kansas*, 123 U. S. 562, 661.

[11] *Collins v. N. H.*, 171 U. S. 30, 33-34.

[12] *Asbell v. Kansas*, 209 U. S. 251, 256.

[13] *Savage v. Jones*, 225 U. S. 501, 528.

the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power."[14]

"* * * the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers"[15] to control the amount of revenue to be derived from intrastate commerce.

"* * * the order of the commission * * * is the result of a clear misapprehension of law, which renders it invalid."[16]

B. The substance of the power sought to be exercised by the Interstate Commerce Commission was power to determine the amount of passenger revenue to be received by interstate carriers from the purely internal commerce of Wisconsin.

The Interstate Commerce Commission was intent upon insuring adequate revenue to interstate carriers from their intrastate business. Applying the words of this court:

"* * * Manifestly, this was deemed by the Commission to be the power which was being exerted," since in the New York decision, virtually made a part of the Wisconsin order under consideration, Mr. Commissioner Eastman "dissented on the ground that the order was an exertion of a power not possessed."[17]

He said:

"The record in the instant case is based upon and conforms to this general theory of our power,

[14] *Southern Pacific Company v. I. C. C.*, 219 U. S. 433, 443, the words, "an unjust discrimination against interstate commerce" being substituted for the words, "an unreasonable rate."

[15] *Id.*, 444.

[16] *Busse & Burgess v. I. C. C.*, 193 Fed. 678, 681.

[17] *So. Pac. Co. v. I. C. C.*, 219 U. S. 433, 449–450.

and it is the only theory, it seems to me, upon which the decision of the majority can in full measure be supported. I am unable to believe that it is sound. * * *

"* * * the carriers have not seen fit to rely upon preference to persons or communities, none of which are complaining, but have rested their case chiefly upon the allegation that the intrastate rates are upon a lower level than the interstate and fail to contribute their fair share of the railway operating income to which we have found that the carriers in the eastern group are entitled."[18]

"No language was inserted in the opinion to indicate to the contrary."[19]

Instead, the Commission emphasized the urgency of the situation from the revenue standpoint:

"* * * to that extent the declared purpose of Congress is defeated by a preferential basis of rates and fares maintained by authority of the state of New York."[20]

In subsequent decisions based upon the Wisconsin, the New York and the Illinois cases—but the one type of power being involved in all the decisions[21]—even fuller illustration of the character of the power claimed is found.

Following the Wisconsin decision, in the Arkansas case, the Commission made it apparent that its judgment coincided with that of the carriers themselves, that resort to the state commission was a matter of courtesy merely, and proceeded to consider the revenue needs of the carriers upon the theory that it was "confronted with practical questions for the

[18] *Rates, Fares and Charges of N. Y. C. R. R. Co.*, 59 *I. C. C.* 290, 300, 302-303, *R.*, 104, 106.

[19] *So. Pac. Co. v. I. C. C.*, 219 U. S. 433, 450.

[20] *Rates, Fares and Charges of N. Y. C. R. R. Co.*, 59 *I. C. C.* 290, 294, *R.*, 99.

[21] *Brief of Messrs. Scott and Burgess*, pp. 48–51.

solution of which Congress has provided a practical course of procedure, by means of which substantial justice is assured."[22] Reference was made to the fact that the order "would result in increased revenue from such transportation of $1,383,831.87."[23]

In the Minnesota case attention was directed to "a loss of approximately $2,742,256 in their gross revenue for the year."[24]

In dealing with Iowa fares, the Commission definitely registered its conception that discrimination other than so-called "revenue discrimination" was not a controlling or material factor. After the usual emphasis on the fact that "the result would be an increase of $3,234,500 over the revenues received," the Commission had this to say:

> "On behalf of the state of Iowa and the Iowa commission it is insisted that there has been no showing that the Iowa intrastate passenger fares and charges do not furnish their proper proportion of a reasonable return upon the value of the railroad property in the state of Iowa, and it is contended that our jurisdiction over intrastate fares extends only to instances in which it is shown that such fares result in unjust and unreasonable preference and advantage to particular individuals or localities in intrastate commerce and in unjust and unreasonable discrimination and prejudice against particular individuals or localities in interstate commerce. Similar contentions were made and discussed at length in *Rates, Fares, and Charges of N. Y. C. R. R. Co.*, 59 I. C. C., 290, and *Intrastate Rates within Illinois, supra*, hereinafter referred to as the New York and Illinois cases, respectively, and it seems unnecessary further to enlarge upon that discussion here."[25]

[22] *Arkansas Rates and Fares*, 59 I. C. C. 471, 473–4.
[23] *Id.*, 475.
[24] *Minnesota Fares and Charges*, 59 I. C. C. 502, 506.
[25] *Iowa Passenger Fares and Charges*, 60 I. C. C. 55, 58.

The Montana decision contained the recitation:

> "* * * the result would have been increases of $896,361.90 in passenger revenue, $7,944.68 in excess-baggage revenue, $89,154.53 in surcharges upon passengers in sleeping cars, and $13,828.29 in surcharges upon passengers in parlor and chair cars over the revenues received."[26]

It gave short shrift to the contention made on behalf of the states in language similar to that of the Iowa case.[27]

Very recent and still more thorough-going illustration of the inspiration of the exercise of its power in revenue production rather than any other consideration is furnished in the case of an electric road lying wholly within the state of Montana. There is some reference to evidence on a prior hearing, but the significant fact set forth is that—

> "Portions of the petitioner's line are paralleled by steam lines, with the result that passengers may now travel between certain points over petitioner's line at lower charges than apply between the same points over a steam line,"[28]

If the new rates were applied, "the result would be an increase of $22,365.12 in passenger revenue."[29]

In the Ohio decision, it was stated:

> "* * * the increases denied by the Ohio authorities would mean a direct loss to the carriers of about $4,600,000."[30]

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[26] *Montana Rates and Fares*, 60 I. C. C. 61, 64.
[27] *Id.*, 64–65.
[28] *I. C. C. No. 11860, Montana Rates and Fares*, 61 I. C. C. 500, 501–502.
[29] *Id.*, 502.
[30] *Ohio Rates, Fares, and Charges*, 60 I. C. C. 78, 80.

In the Michigan case, it was stated:

> "It is estimated by the carriers that on a year's business the present basis of charge in Michigan would mean considerably over $2,500,000 less than if the 3.6-cent basis were made effective. If the 2.5-cent basis were applied, the loss, as it is called, would be about doubled. *These amounts indicate, the extent to which intrastate traffic fails to contribute in fair proportion to the revenues of the carriers.*"[31]

In the South Carolina case, the position of the Commission was stated almost in the language of Commissioner Eastman's dissenting opinion:

> "The law requires us to fix rates, fares, and charges so that the carriers shall, under specified conditions, earn, as nearly as may be, a certain return upon the aggregate value of the railway property held for and used in the service of transportation, and it follows that to the extent that intrastate rates, fares, and charges do not contribute their proportionate share to such return they unjustly discriminate against interstate commerce."[32]

From the Nebraska decision, it appears that the Commission acted upon the theory that all independent judgment of the states was at an end. Commenting upon its own action in entering the order increasing interstate rates, it said:

> "In reaching this conclusion, we anticipated that the various state authorities would grant corresponding increases, as most of them have since done."[33]

It noted:

> "The carriers estimate, upon what appears to be a fair basis, that on a year's business their revenues

[31] *Michigan Passenger Fares*, 60 I. C. C. 245, 248.
[32] *South Carolina Fares and Charges*, 60 I. C. C. 290, 297.
[33] *Nebraska Rates, Fares, and Charges*, 60 I. C. C. 305, 306.

from Nebraska intrastate traffic would be about $3,200,000 less than if the increases authorized by us for interstate commerce were applied intrastate."[34]

The Commission passed upon the question of reasonableness of fares within the state:

"We are unable to reach any satisfactory conclusion upon this record as to whether it costs more or less to handle the intrastate than the interstate traffic in Nebraska. There is probably not much difference in the cost. Moreover, cost is only one of the elements to be considered. Even if we could determine the cost of the service, the question of what would be a proper relationship of fares would still be a matter of judgment. If it does cost more to handle one character of passenger traffic than the other, it would not necessarily follow that there should be a difference in fares."[35]

We find registry of the same conception that the function of state authority had degenerated into automatic acceptance of federal decision in the Indiana case. It was said as to the increase of interstate rates:

"In reaching this conclusion we anticipated that the various state authorities would grant corresponding increases, as most of them have since done."[36]

The true nature of the proceedings appears from the statement:

"*The carriers are interested mainly in the revenue feature of the case.* They estimate that on a year's business the rates, fares, and charges required by

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[34] *Id.*, 307.
[35] *Id.*, 308.
[36] *Indiana Rates, Fares, and Charges*, 60 I. C. C. 337, 338.

the Indiana commission would result in about $5,500,000 less than if the increases sought were applied."[37] (The "loss" being $2,000,000 from passenger fares.)

The conventional allegation appears in the North Carolina decision:

> "* * * the direct loss of revenue to nine of the more important respondents through failure to secure the 20 per cent increase in these fares will approximate $1,748,000."[38]

In the Utah case, it is noted without protest by the Commission:

> "In the proceeding before the state commission the carriers refused to deal with individual rates or individual commodities, contending that it was a revenue and not a rate case."[39]

In the Texas report, the statement is made as to revenue:

> "With the same volume of traffic, intrastate application of the fares that were approved by us and made effective on interstate travel would yield an annual return greater by $7,000,000."[40]

Reference is made to the reasoning which underlay the Illinois decision, and its conception of power is re-emphasized:

> "We adhere to that view and repeat that, in our opinion, the manifest intent of Congress was to repose in us full and final authority *to provide the revenues found necessary to yield the specified return by considering the entire structure of rates, both state*

[37] *Id.*, 340.
[38] *North Carolina Fares, and Charges*, 60 I. C. C. 362, 364.
[39] *Utah Rates, Fares, and Charges*, 60 I. C. C. 388, 389.
[40] *In the Matter of Intrastate Rates Within the State of Texas*, 60 I. C. C. 421, 423.

and interstate, and the aggregate value of the railroad property held for and used in the service of transportation without regard to state lines, and to protect interstate commerce against any rate, fare, charge, classification, regulation, or practice that causes any undue, unreasonable, or unjust discrimination."[41]

The climax in the exposition of its views is found in the Louisiana case. It was there set forth:

> "* * * an increase of the intrastate fares to the level authorized by us for interstate application and now in force would enhance the revenues of these respondents from intrastate travel to the extent of $1,457,631.98. For the Louisiana Railway & Navigation Company, which is not embraced within the compilation referred to, it is shown that, based on the volume of intrastate travel for the first nine months of 1920 failure to increase its intrastate passenger fares to the level of the interstate fares will result in an annual loss to it of approximately $100,000. About 96 per cent of the total passenger revenue of this line is derived from intrastate travel."[42]

It is made apparent that the Commission conceived that it possessed jurisdiction, if every factor in the situation were eliminated other than that of supposedly inadequate return from intrastate traffic, it being said:

> "It is admitted that there is no discrimination as between intrastate shippers of sugar cane and interstate shippers of the same commodity. There is here no interstate commerce in sugar cane, but it seems manifestly unjust that interstate commerce and interstate shippers should be required to forego the use of needed equipment in order that this par-

[41] *Id.*, 426.

[42] *Louisiana Rates, Fares, and Charges*, 60 I. C. C. 467, 471–2.

ticular traffic may be accorded a preference, and that interstate commerce and interstate shippers should be penalized through the medium of necessarily higher interstate rates in order to meet the deficiency in revenue, amply portrayed upon this record, growing out of the preferred treatment of this particular kind of intrastate traffic and this special class of intrastate shippers."[43]

In the Nevada decision, we find an estimate that—

"the direct loss of revenue through failure to secure the 20 per cent increase in intrastate fares will approximate $145,000. Estimates based on the traffic for the first eight months of 1920 indicate that their annual 'loss' would approximate $150,000."[44]

The North Dakota decision contains the statement:

"* * * the direct loss of revenue through failure to secure the 20 per cent increase in intrastate fares will approximate $800,000."[45]

Jurisdiction was exercised in the Arizona case as in the Arkansas case, notwithstanding failure to make preliminary application to state authority. We find the recital:

"Respondents estimate that upon the normal intrastate passenger traffic of Arizona, they are losing not less than $450,000 per annum by their failure to secure from the state authorities permission to make the same increases intrastate as we authorized interstate."[46]

That the order in question "was based upon the belief by the Commission that it had the right under

[43] *Id.*, 476.
[44] *Nevada Rates, Fares, and Charges*, 60 I. C. C. 623, 627.
[45] *North Dakota Rates, Fares, and Charges* 61 I. C. C. 504, 506.
[46] *Arizona Rates, Fares, and Charges*, 61 I. C. C. 572, 575.

the law" to alter an entire schedule of state rates, solely because of alleged loss or insufficiency of revenue, is made the more clearly apparent by the opinions of various courts brought to the attention of this court by counsel for the railroad company.

In the Ohio decision, it was said:

> "It has now, for the first time, become the duty of the Interstate Commerce Commission to fix interstate rates so that the railroads will receive a specified net rate from *their entire business.* An injury to a part injures the whole. It seems obvious that if a rate of 3.6 cents upon all the traffic is necessary in order to earn the prescribed net return, action by the state compelling a less rate on intrastate business will in turn compel the imposition of a larger rate upon the interstate business, and seems highly probable that each railroad does so much interstate business that it suffers from this burden."[47]

In the Indiana case, Judge Baker, who sat in the Wisconsin case, reiterated the controlling reason for the entry of a temporary injunction in these words:

> "May Indiana or any other State, for the benefit of its own people, say that we are going to have this more expensive article at a less price than it has been found that the national article must bring in order to maintain the existence of these national highways, and we are to get it at the expense of the commerce and of the rest of the country? Not so, *and that is the reason that the temporary injunction will be issued.*"[48]

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[47]Memorandum presenting decisions of nineteen judges of the United States Circuit and District Courts sustaining orders of Interstate Commerce Commission in Wisconsin Passenger Fare Case and similar cases, filed by Messrs. Scott and Burgess, 7.

[48]*Id.*, 32.

In the New York case, it was said:

"The facts found by the Commission and upon which it based its order, well illustrate the need for regulation of the intrastate rates by the Interstate Commerce Commission. Under the Transportation Act, it was thought to enable the carriers to earn an aggregate annual net railway operating income, equal, as nearly as may be, to 6 per cent upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. To accomplish this, the Commission is required to modify, establish, or adjust rates for the carriers as a whole or as a whole in each of such rate groups or territories as the Commission shall from time to time designate. The carriers here are included in the Eastern group. To permit the New York State Law to prevail and the orders of the Public Service Commission of the State of New York to be enforced, would create an unjust discrimination of rates between the intrastate rate for New York and the interstate rate, which, in turn, would cast a burden upon the interstate commerce of the railroads within this group, resulting in such a rise for maintenance of prices of rates and fares within the Eastern Group so as to make up the deficiency caused by the lower intrastate rates and fares, which the Commission finds is between eleven and twelve million dollars per year."[49]

Counsel for the railroad while seeking to sustain the order upon the ground that it was sanctioned in the exercise of jurisdiction to remove discrimination as that term had been employed in prior decisions, none the less gave emphasis to the same conception:

"It is evident, therefore, that *when Congress prohibited* preferences, and prejudices between persons

[49] *Id.*, 22; *Lehigh Valley R. Co. v. Public Service Commission*, 272 Fed. 758, 767.

and localities in interstate commerce on the one hand and intrastate commerce on the other hand, *and unjust discrimination against interstate commerce as such, it meant that there should be no such action on the part of the States as would hinder or cripple or embarrass or impede the free transportation of persons and commodities in interstate commerce*, whether that interference should take the form of prejudicing persons or localities directly or indirectly, or *whether its necessary effect would be to interfere with the plan devised by Congress for sustaining and supporting these instrumentalities under such circumstances and events as should from time to time transpire.*"[50]

While particular emphasis was given to the "extent of deprivation of financial support" reference being made to a "total direct loss of $41,680,256 in these nine states."[51]

Associate counsel argued:

> When it is remembered that under 15a of the *Interstate Commerce Act it is made the duty of the Commission to provide revenues up to a certain standard and to supply out of interstate commerce all that is not contributed by state commerce*, and that thus, in the instant case, if the state can effectively prevent the contribution from state business of the part of the revenues which it was assumed in Ex Parte 74 they would contribute, then it would become necessary, under the law, for the Interstate Commerce Commission to increase again the rates on interstate commerce to produce the result required by the Act. Thus, if the power here claimed by the appellants may be exercised by them, the result would be, under the automatic operation of the Transportation Act, a further increase of interstate rates and a further discrimination against interstate commerce."[52]

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[50] *Brief of Messrs. Scott & Burgess*, 40–41.
[51] *Id.*, 68, 69.
[52] *Brief of Mr. Alfred P. Thom*, 55.

While upon his oral argument stress was laid upon the fact that state traffic:

> "* * * would have to contribute to this policy of the Interstate Commerce Commission and of Congress about $233,000,000."[53]

We are dealing therefore not with a discrimination order but with "a disguised revenue measure."

> "The majority of the Commission plainly could not and would not have made their order * * * but for a view of the law upon which this court must pass."[54]

C. The Transportation Act conferred no power upon the Interstate Commerce Commission to increase the intrastate passenger rates for the purpose of making them conform to an alleged standard of return prescribed by Congress.

1. Carriers' theory of the law stated.

The real question at issue has been admirably stated in one of the briefs filed on behalf of the carriers *Amicus Curiae:*

> "The sole question for discussion is whether the Transportation Act, 1920, has authorized the Commission to make a horizontal order adjusting the level of rates within a given State to conform to like adjustments of the interstate rate level and applicable to all carriers within the rate group defined by the Commission pursuant to Section 422 (2) of the Transportation Act."[55]

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[53] *Oral Argument, Mr. Alfred P. Thom.*
[54] *I. C. C. v. Northern Pac. R. Co.*, 216 U. S. 538, 544.
[55] *Brief on behalf of National Association of Owners of Railroad Securities*, Forney Johnston, Counsel, 9.

The contention being that:

"* * * The Commission appropriately exerted its jurisdiction, the exercise of which is by the Act made mandatory, to initiate and put into effect a horizontal adjustment of existing rate levels, both interstate and intrastate, *without necessary reference to the question of discrimination* in order to produce the minimum living return required by Congress for the instrumentalities of interstate commerce within the particular groups involved."[56]

Counsel of record declare:

"Congress was careful to prescribe a standard to which the states must adhere."[57]

A similar sweeping assertion is made:

"The return which must be provided is required to come from all traffic, state and interstate."[58]

Obviously here lies the crux of the present controversy. Unless such a standard was laid down and such requirement as to contribution made, there could be no possibility of finding discrimination or burden on interstate commerce as the result of inadequate intrastate return.

2. Carriers' argument analyzed.

We may lay entirely out of account all that portion of the four briefs on file directed to establishing the constitutional power of Congress to assume exclusive control of all rates for the use of an instrumentality

[56] *Id.*, 11.
[57] *Brief of Messrs. Scott and Burgess*, 38.
[58] *Brief of Mr. Alfred P. Thom*, 47.

of interstate commerce and to delegate the administration of such control to the Interstate Commerce Commission as propositions conceded or at least undisputed by the appellants upon this argument. So much of the argument as seeks to sustain the contention that Congress has asserted this power may be compressed into a very slender compass. As a matter of inducement properly set forth and legitimately emphasized "the environment at the time of the enactment" of the law is stressed.[59] The environment sought to be established possessed the element of crisis for:

> "*The tragic events of the war concentrated public attention upon many problems which were theretofore treated with indifference.*"[60]

As to which it is further said:

> "During the period of federal control which began * * * as a wartime measure, * * * the entire problem of successful railroad operation had changed."[61]

And counsel say as to the act of Congress:

> "The legislation which it enacted is to be interpreted so as to give effect to its efforts to avert a catastrophe to the entire country through the breakdown of interstate commerce."[62]

His associate alarmed at the evil consequences of the "triumph of dissenting state opinion" exclaims:

> "The Transportation Act, 1920, must clearly be construed as not permitting such a consequence."[63]

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[59]*Brief of Messrs. Scott & Burgess*, pp. 23–30; *Brief of Mr. Alfred P. Thom*, 37–46.
[60]*Brief of Mr. Alfred P. Thom*, 41.
[61]*Brief of Messrs. Scott and Burgess*, 27.
[62]*Brief of Messrs. Scott and Burgess*, 30.
[63]*Brief of Mr. Alfred P. Thom*, 44–45.

But when we pass from atmosphere to argument all the light brought to focus upon the one and only issue in the case, the sum, substance and totality of all that is really material or pertinent to the question before the court in all the briefs on file is embodied in extracts following:

> "It is impossible to read Section 15a (Sec. 422, Transportation Act) and Section 13 (Sec. 416 Transportation Act) of the Interstate Commerce Act as they stand today, each in the light of the other, and both in the light of the underlying purpose of Congress, and arrive at any other conclusion than that Congress had determined the time had arrived when the interstate and intrastate transactions of interstate carriers had become so intermingled as to require ultimate responsibility for both to be within the realm of National Supervision."[64]

To which may be added:

> "In Section 422 (Sec. 15a of the Interstate Commerce Act), the Commission is required to find the aggregate value of the property of the carriers held for and used in the service of transportation, and is not permitted to exclude any part of it because used for state transportation, or to make any distinction between that which is used in state service and that which is used in interstate service. *The obligation is plainly laid upon the Commission to value and include it all.*
>
> Likewise, when it comes to the question of the "fair return" prescribed by the act (which the act required shall be 5½ or 6 per cent, as near as practicable, on the aggregate values for the first two years, and after that, such percentage as the Commission may determine will constitute a "fair return"), no exclusion is permitted of the revenues derived from state traffic."[65]

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[64] *Brief of Messrs. Scott and Burgess*, 39.
[65] *Brief of Mr. Alfred P. Thom*, 46–47.

This is not demonstration—it is not even argument—it is mere assertion of confident and sweeping character, apparently the result of an over-mastering obsession that Congress had been actuated by a conception of public policy natural to counsel by reason of the highly specialized viewpoint incident to their employment.

3. Carriers' argument answered.

a. The environment surrounding the act of Congress.

But a transportation crisis aggravated as alleged by jealousy of state or section was not the only problem upon which "the tragic events of the war concentrated public attention." That war itself it may well have been believed was a product, the logical precipitate of an over-centralized government.

> "In Prussia at least the medieval system of local self government had succumbed completely to the centralizing policy of the monarchy, and when it was revived it was at the will and for the purposes of the central authorities as subsidiary to the bureaucratic system."[66]

Thoughtful men pre-eminent in the field of oratory, of history, of philosophy, statesmanship and jurisprudence had warned of the dangers of similar tendencies here in America. Excerpts gathered from their utterances might be framed into a mosaic vividly portraying national peril.

John Fiske, 1889—

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[66] *11th Edition, Encyc. Brit.*, Vol. XI, p. 818. Article, "Germany."

"Centralized administrations like that of the Roman Empire have fallen to pieces not because of too much but because of too little freedom."[67]

Henry W. Grady, 1889—

"The integrity of the State, its rights and its powers,—these maintained with firmness but in loyalty—these shall yet, by lodging the option of local affairs in each locality, meet the needs of this vast and complex government, and check the headlong rush to that despotism that reason could not defend, nor the armies of the Czar maintain, among a free and enlightened people."[68]

Josiah Royce, 1902—

"* * * in the present state of the world's civilization, and of the life of our own country, the time has come to emphasize, with a new meaning and intensity, the positive value, the absolute necessity for our welfare, of a wholesome provincialism, as a saving power to which the world in the near future will need more and more to appeal."[69]

Elihu Root, 1916—

"There will always be danger of developing our law along lines which will break down the carefully adjusted distribution of powers between the national and the state government. Upon the preservation of that balance, not necessarily in detail but in substance, depends, upon the one hand, the maintenance of our national power and, on the other hand, the preservation of that local self-government which in so vast a country is essential to real liberty. * * * And if the process goes on our local governments will grow weaker and the central

[67]Beginnings of New England, 23.

[68]Speech against Centralization. Orations and Speeches of Henry W. Grady: Shurter, 134, 152.

[69]Address, "Provincialism," delivered before Phi Beta Kappa Society, University of Iowa. Reprinted in "Race Questions and Other American Problems," 57, 62.

government stronger in control of local affairs until local government is dominated from Washington by the votes of distant majorities indifferent to local customs and needs. When that time comes the freedom of adjustment which preserves both national power and local liberty in our system, will be destroyed and the breaking up of the union will inevitably follow."[70]

Chief Justice White, June 16, 1916—

"the destruction of individual right which would arise from reducing the States to mere dependent vassals deprived of local autonomy and to be governed from afar by a centralized government, whether of executive power or of bureaucratic authority."

"A fusion of state and national power united but not destroyed * * * the very concepts upon which our institutions must rest."[71]

Lindley M. Garrison, 1916—

"* * * By the modern tendency of casting innumerable duties upon the federal government which it was never intended that it should exercise, we are not only entirely changing the frame work of our system of government, but are producing a situation which cannot endure. The federal government will break of its own weight unless the tendency is checked and a return to correct principles is had."[72]

Charles E. Hughes, 1916—

"But in the face of the difficulties already upon us, and destined to increase in number and gravity, we remain convinced of the necessity of autono-

[70]Address as President of the American Bar Association, "Public Service by the Bar." Vol. 41, Reports of American Bar Association, 355, 370-371.

[71]Response to resolutions on the death of Mr. Justice Lamar, 241 U. S., XVI, XVII, XVIII.

[72]Address, "Democracy and Law." Vol. 41, Reports of American Bar Association, 375, 388; see also 389, 390, 391.

mous local governments. An over-centralized government would break down of its own weight."[73]

Congress must be presumed to have had before it the declaration of this court on June 13, 1918:

> "* * * the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."[74]

Congress was in full possession, no doubt, of all the facts that prompted President Harding but recently to say:

> "So must we guard against the supreme centralization of power at home. * * * The one outstanding danger of today is the tendency to turn to Washington for the things which are the tasks or the duties of the forty-eight Commonwealths which constitute the Nation."[75]

The composite of all the thought and sentiment thus set forth is embodied in a recent striking public utterance:

> "No intelligent person, who has any knowledge of history, and of the protection which local government has always given to human freedom, can fail to feel a deep and at times shuddering sense of apprehension at the rapidity with which we are massing our governmental power and authority in the vortex at Washington."[76]

No phenomenon of the war, which it has been judicially said "means practically absolutism for the

[73]Address before New York Bar Association, Vol. 19, Law Notes, 228, 229.

[74]*Hammer v. Dagenhart*, 247 U. S. 251, 276.

[75]Speech of President Harding at Plymouth, Mass., on August 1. Senate Doc. No. 60, 67th Congress. Vol. 61, Congressional Record, 5260, 5261-2.

[76]Henry M. Bates, Dean, Michigan Law School, before Milwaukee Bar Association, Nov. 19, 1921.

time being,"[77] was so pronounced as the incessant urge of "bureaumania" toward centralization. Might it not be that Congress felt the dangers prophesied now stood tiptoe on the threshold of reality? Might it not be urged upon the court that, while men walked unsteadily upon a planet not yet in equilibrium following the rude jar of world conflict wherein centralization gone mad had sought with brutal shoulder to topple over the edifice of civilization, Congress hesitated to establish a plan for the complete extinction of state authority in its ultimate aspect over a subject matter long in state control? Of the scheme which counsel contend Congress adopted, they say:

> "The interstate and intrastate transactions of interstate carriers had become so intermingled as to require ultimate responsibility for both to be within the *realm* of *National supervision*."[78]

While cessation or interruption or breakdown of transportation facilities might involve discomfort and inconvenience, if over-centralization really threatened national life, is it not possible that Congress might have been upon the alert to preserve, to safeguard and to strengthen the spirit of local independence and initiative, and to ward off the evil day when "an over-centralized government would break down of its own weight." May not its members have thought—

> "We must scrutinize closely and jealously every new proposal for increased national governmental power."[79]

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[77]*State ex rel. Blaine v. Wis. Tel. Co.*, 169 Wis. 198, 204.
[78]*Brief of Messrs. Scott and Burgess*, 39.
[79]Henry M. Bates, Dean, Michigan Law School, before Milwaukee Bar Association, Nov. 19, 1921.

Were all this said, as well it might be said in the expression of conviction earnestly entertained, assertion would merely have been matched with counter-assertion, rhetoric balanced with rhetoric, and the court supplied with illustration of the diverse prepossession of counsel that Congress could only have acted in accordance with their conception of the paramount need of the hour. But this would mark no progress, make no advance in the solution of pending inquiry unless some tangible evidence might be laid hold of to demonstrate that the environment alleged actually influenced legislation.

b. Evidence that Congress was intent upon the restoration of state power.

Evidence we think is available that considerations such as those set forth worked a powerful influence upon congressional action. What Congress actually did contemporaneously with the consideration of the Transportation Act—almost coincident with its adoption by the House—has far more vital significance than the bald statement by counsel on either side of what it must have done because of what they conceive it should have done.

The House on October 30th—the Senate on November 3rd, 1919—seventeen days and fourteen days respectively before the adoption of the Transportation Act by the House—on November 17th, 1919, passed an act[80] whose history has already been detailed[81] whose effect was thus stated by President Wilson:

"The bill deprives the Government of the United States, while still charged with the exclusive re-

[80]S. 641, 66th Congress, First Session.
[81]Supplemental Brief of Appellants.

sponsibility for operating the railroads during Federal control, of any power to make any change in any intrastate rate, fare, charge, classification, regulation, or practice without having first secured the approval of the proper State regulating tribunal, whereas under the Federal Control Act as originally enacted the Government of the United States had the same power to determine these intrastate matters as it had to determine similar matters of an interstate character."[82]

and which he vetoed because of the view that

> "*While the Federal Government is solely responsible, it seems to me that entirely independent and final power as to a large proportion of these vital matters should not be transferred to the respective States.*"[83]

That he accepted such restriction as a normal peace time limitation is indicated by the comment:

> "The broad question of general principle which I have just discussed might perhaps be waived in view of the *short duration of Federal control.*"[84]

Nor are we left in doubt as to the reasons that prompted this enactment.

> "Since the signing of the armistice there has been a steadily increasing demand for a return to the prewar status of rate making and rate regulation."[85]
>
> "The committee is of the opinion that jurisdiction over any new intrastate rates should rest with the State regulatory bodies. These tribunals are in close touch with transportation in their respective States and can give intelligent and prompt consideration of the questions presented by any proposed change. It will be noted that no power is

[82]Document 155, 66th Congress, First Session, 1.
[83]Document 155, 66th Congress, First Session, 2.
[84]Document 155, 66th Congress, First Session, 2.
[85]Report No. 230 H. R., 66th Congress, First Session, Report to accompany S. 641, 4.

given by the proposed committee amendment to the State commissions to investigate or in anywise interfere with the present rate structure, but their jurisdiction relates alone to future changes or increases. The director general has been following the practice of consulting with State commissions and stated to the committee:

> In addition to that, it has further been our policy with respect to intrastate rates, in every case where it was at all possible, to keep in touch with the State railroad commissions and get the benefit of their advice. (Hearings, p. 48.)

The Interstate Commerce Commission would still, of course, have jurisdiction over intrastate rates affecting interstate commerce, *when the facts came within the rule laid down in the Shreveport case.*

> In these reconstruction days one of the important needs is stability in business. It is the belief of the committee that the passage of this act with the amendments proposed will be a long stride toward that end."[86]

This we submit for proof, not mere prepossession. The restoration of state power was deemed so important that Congress was willing to cumber the presidential exercise of the war power—the power of practical absolutism—with power of veto in the states over all change or increase in state rates. This let it be recalled, was done when there remained but two months of federal control if the president carried out his announced purpose.[87] Are we to think that the American Congress had become so flabby of purpose that it sought to restore state power for two months and then two weeks later took away for all time the

[86] *Id.*, 5, 6.

[87] On May 20, 1919, the President announced to Congress his intention of terminating federal control at the end of the calendar year (Congressional Record, 66th Congress, First Session, Vol. 58, part 1, page 42) Brief of Messrs. Scott and Burgess, 26.

power thus restored? Can we consistently with any degree of respect for the great legislative body which matured and perfected the Transportation Act before the same committees that reported the act described concede or conceive that its conduct was so utterly futile as must be concluded if the contention of the carriers be accepted?

c. Antecedent probability as to the form of congressional action.

If the time had arrived when Congress within the scope of its conceded constitutional power had decided to assert a unified control over all commerce, is it probable that it would have done so by an act entitled as was the Transportation Act? The law was not labelled as it might have been were such the intention "an act for the extinction of state control." Instead it was plainly designated "an act to provide for the termination of federal control." Early in the history of the development of constitutional law in America, this canon of statutory construction was propounded:

> "Men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey."[88]

If we are now to think that Congress intended to perpetrate a paradox wherein state control over intrastate rates was final during the remainder of the period of federal control and then completely extinguish state authority by "an act to provide for the termination of Federal control," what has become of this rule of common sense and of common honesty?

[88] *Gibbons v. Ogden*, 9 Wheat. 1, 188.

We debate the question of congressional policy, not of constitutional power. We seek the interpretation of an act of Congress invested with unlimited power over the subject matter of interstate commerce, but still "convinced of the necessity of autonomous local governments." We argue that, if in the exercise of its power over interstate commerce Congress had intended to assert that power to the full, it would have done so by direct, dignified, simple, and single declaration that it had taken all commerce to be the province of its regulation. State power, then, under elementary rules, would have ceased to function.

The particularity, detail, and precision with which Congress provided for the restoration of state control has already been fully set forth.[89] Under an elaborate pretense of restoring state power, Congress would not have masked the intention of effectually displacing it by the construction of administrative machinery for its elimination.

But our contention goes beyond insistence upon the unlikelihood that Congress would do one thing, while it professed to do another. It is directed to the improbability that by any language or form of words it would have sought to inaugurate the plan of regulation for which the carriers argue.

The delegation of power to an administrative bureau to suspend, not the incidental effect of state law, but state law in its entirety, is too novel, too revolutionary, a suggestion to be accepted without examination. To withdraw a subject matter from the control of the states by the assertion of a previously unexercised exclusive federal power is a matter of com-

[89]Appellants' original brief, 14–29, 38, 39, 40.

monplace. To leave a qualified control subject to displacement by mere administrative fiat is, we submit, quite a different proposition,—a step radical, if not revolutionary. It is not regulation of commerce; it is supervisory control—it is regulation—of state government by a federal administrative agency without parallel in existing law, and without precedent in American history.

The essence of the scheme set up is "jurisdiction over the ultimate and final regulation * * * over state rates as a matter of supervisory jurisdiction,"[90] which device "may have the effect of completely displacing state jurisdiction over state commerce."[91] Assuming intention to establish such supervisory jurisdiction, plainly it would be exercised in one of two ways, in the absence of some arrangement in the nature of appeal from state to federal authority. This, of course, was not embodied in the scheme, as the Commission has said, "We are not vested with appellate power."[92] The first of such plans would involve detailed examination of facts to determine the reasonableness of state rates by state authority, in the first instance, followed by a complete re-examination of the same facts as an original proposition in the same painstaking way by the Interstate Commerce Commission itself. The waste of effort and energy involved in such a complete duplication of effort necessitates laying this plan completely out of account.

The reasonableness of state rates, from the standpoint of a fair return upon the property allocated to

[90] *Brief of Mr. Alfred P. Thom*, 46.

[91] *Rates, Fares, and Charges of N. Y. C. R. R. Co. et al in the state of New York;* 59 I. C. C. 290, 292; R. 97.

[92] *Arkansas Rates and Fares*, 59 I. C. C. 471, 474; *Arizona Rates, Fares, and Charges*, 61 I. C. C. 572, 573.

the state business was not a matter of concern in a hearing before the Commission.[93] The alternative is the "practical course of procedure"[94] which the Commission elected to follow. This practical scheme means nothing more nor less than that the state must automatically register the will of the Commission. Such is the plain implication of the Commission's language, already quoted.[95] True, the contrary is argued, but singularly enough, in all of the cases presented to the Commission to date, apparently there has been no case other than certain coal rates in Indiana, in which any exception has been made. In practical effect, whenever and wherever any difference in rate level as the result of failure to follow the lead of the Commission, has been found the jurisdiction of the states has been automatically displaced, upon that fact having been shown. This, then, is the type of power supposed to have been created, as demonstrated by its actual exercise, and this is the plan, granting that Congress desired to attain the result of uniform revenue productivity, which is stamped with improbability. Plainly possessing the competence and the power to do so, if Congress had intended to regulate the amount of revenue arising from state rates, it seems self-evident that it would have asserted that power directly.

The pungent query of Congressman Sanders is apropos:

> "What is the use of taking two bites at the cherry? Why don't you provide, since this Interstate Com-

[93] *Iowa Passenger Fares and Charges*, 60 I. C. C. 55, 58; *Montana Rates and Fares*, 60 I. C. C. 61, 64–65.

[94] *Arkansas Rates and Fares*, 59 I. C. C. 471, 473–474.

[95] *Nebraska Rates, Fares, and Charges*, 60 I. C. C. 304, 306; *Indiana Rates, Fares, and Charges*, 60 I. C. C. 337, 338.

> merce Commission must take over this vast amount of work and this great responsibility, why don't you provide that they shall draw up a schedule covering every rate of these carriers, whether interstate or intrastate?"[96]

There is no factor in the situation requiring the exercise of judgment by experts "informed by experience." To decide that a high rate will produce more money than a low rate on the same volume of traffic is, as counsel aptly puts it, nothing more than—

> "To direct them to exercise the knowledge that every schoolboy has as to when one figure representing cents per mile is mathematically greater than another."[97]

Not a single argument can be suggested, if rate uniformity were the end desired, why Congress should not have dealt with the matter directly. To say, as counsel do, that—

> "Congress yielded to the urgent solicitation of some of the States by returning to the States a portion of the duty and responsibility which they had had in respect thereto"[98]

is but to assert that it sought temporarily to delude the states with the belief that they possessed a power which had been in fact destroyed. It is to say that Congress had grown so infatuated with the sport of baiting state authorities as to set up an elaborate pretense of jurisdiction in the states, only to demonstrate at the psychological moment that such juris-

[96]Hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, 66th Cong., 1st Sess., on H. R. 4378, 1079.

[97]Second supplemental brief of Scott and Burgess, 5.

[98]*Brief of Messrs. Scott and Burgess*, 37.

diction was non-existent. Surely, Congress was not so enamoured of the bureaucratic idea, of the Prussian scheme of things, as to institute an administrative device for subjecting the very stuff of state authority—the exercise of state power in gross, to the review of a Commission at Washington. Such a scheme, revolutionary and inconsistent with all the traditions of American Government, might be suited perhaps to the regulation of captured provinces, but is hardly to be reconciled with a government of *united states*. Plainly, had Congress intended to place this jurisdiction in the Commission, it would have done so in direct and expeditious fashion, conferring power to regulate all rates in the first instance, particularly so in view of the fact that when it legislated, a complete system of federal control of all state rates was actually in force, to which the states had grown accustomed after an interval of experience.

d. Insufficiency of Section 13 of the Commerce Act as amended to authorize action taken.

Apart from mere probability, we insist that the language employed does not permit of the construction essential to sustain the validity of the order. Two sections are relied on in the amended Interstate Commerce Act—Section 13 and Section 15a, as establishing a purpose "clearly manifested" to "supersede or suspend the exercise of state power." It is insisted indeed that it is impossible to read them and come to any other conclusion. To make clear our position as to Section 13, which deals with the removal of discrimination resulting from state action, we make no contention that there is any type, form or variety of discrimination resulting from state ac-

tion that may not be removed. We concede, further, that if discrimination actually disclosed leads to successive orders, the entire field of state authority may conceivably be absorbed. This, of course, is subject to the elementary rule of definiteness and certainty in the finding of discrimination. It is our contention merely that no discrimination has been found.

(1) Modification of view as to effect of "Rebuying" tickets.

Here may be noted a minor modification in our point of view differing from that held at the prior argument. In the brief originally filed, it was stated:

> "An intrastate rate produces discrimination when the necessary result of its maintenance in force is to cause a substantial number of people who would otherwise travel in interstate commerce to desert that travel for intrastate commerce."[99]

Attention was directed to this portion of the brief by Mr. Benton in his oral argument, and likewise in his supplemental brief, and was referred to by Mr. Scott in oral argument.

If it stated the rule of law correctly, the order in question would still be void, because of its indefiniteness. Fuller consideration, however, has led to the conclusion that mere desertion of travel in interstate commerce for travel intrastate does not constitute discrimination against interstate commerce.

A number of definitions of discrimination were gathered in the earlier brief.[100] The test, we think, in all cases of whether discrimination exists or not is

[99]Appellant's original brief, 31.
[100]*Id.*, pp. 30–31.

its resulting interference with interstate commerce. Only when commerce has been "obstructed or unnecessarily encumbered by state legislation,"[101] when state action creates "obstructions to the freedom of interstate commerce";[102] when it "essentially obstructs the free flow of commerce between the states,"[103] has the action been shown to be discriminatory. Until Congress, by the assertion of dominion of exclusive power over all commerce automatically suspends the power of the state to legislate at all, the state works no discrimination, so long as it refrains "from interfering with the free course of trade and commerce among the states."[104] As Mr. Benton has pointed out, the stream of commercial intercourse is not clogged when a person re-buys a ticket at a state line—the physical movement of commerce may actually be stimulated—but above this, it is submitted that the volume of interstate commerce is not decreased, although an individual may by resort to subterfuge successfully defraud the carrier and procure interstate transportation at intrastate cost. But this matter is very largely within the control of the carrier itself. So simple an expedient as closing the window for the sale of tickets after the arrival of the interstate train coupled with an adequate penalty on the tender of a cash fare for failure to possess a ticket would seem to be wholly sufficient to defeat such a practice. The exercise of jurisdiction by the Commission to regulate the amount of such penalty is illustrated in the South Carolina Case.[105] The carrier is under no obligation to

[101] *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 9.
[102] *In re Debs*, 158 U. S. 564, 582.
[103] *Loewe v. Lawler*, 208 U. S. 274, 293.
[104] *Northern Securities Co. v. U. S.*, 193 U. S. 197, 346.
[105] *South Carolina Fares and Charges*, 60 I. C. C., 290, 298–299.

carry the passenger who has re-bought a ticket at a state line. This rule has been judicially declared.[106]

The carriers may not legally permit the use of the lower fare within a state. We are told that so far from discouraging the practice the railroad companies actually hold their trains to accommodate those who thus seek to violate the law. They are thus in effect pleading their own wrong when they urge loss of revenue resulting from their own neglect as ground for a general increase of intrastate rates. We believe it no more pertinent to the issue than if the same action were asked for, because of a widely prevalent practice due to corrupt conduct of employees and to laxness in the administration of criminal law which resulted in numerous individuals being carried upon trains cost free within the state. Large loss of revenue through the prevalence of illegal practice, particularly where the carrier has it within its own power to terminate the practice, does not result in discrimination against interstate commerce which permits or necessitates removal by the Interstate Commerce Commission.

(2) No discrimination or burden from lower intrastate level.

Even at the risk of seeming to re-assert the obvious, we insist that discrimination does not arise from mere difference in rate level, or from inadequacy of intrastate rates, until in effect the legal conception of the two classes of commerce denominated "inter-

[106] *Missouri K & T. Ry. Co. v. Ashinger*, 63 Okla. 120, 162 Pac. 811, L. R. A. 1917 D, 1180; *Ill. Cent. Ry. Co. v. Holman*, 106 Miss. 449, 64 So. 7; *Chicago R. I. & G. Ry. Co. v. Edwards*, 232 S. W. 356 (Texas decision). See also *Chicago R. I. & R. Ry. Co. v. Weaver*, 171 Pac. 34 (affirmed in reliance on Ashinger case).

state" and "intrastate" has been abandoned. This will be made apparent by the use of a homely illustration.

The interstate carriers of the country discharging a dual function gather revenue from dual sources. This revenue in legal theory is collected into two wholly separate and unconnected containers. A full container is the measure of right on either side. The stream of revenue from each class of commerce must be sufficient to fill each container to the level of complete adequacy and reasonableness. In case the revenue stream be insufficient to maintain the level in one container, it will be impossible to insure an average of two full containers by adding an excess quantity to the other container. As in the law of physics, more than a full container is a manifest impossibility, so in the law of carriers collection of revenue in excess of a reasonably adequate return is a constitutional impossibility. The remedy for any condition resulting in less than a full and adequate return in either class of commerce is resort to the compulsive arm of equity, and not an attempt to violate constitutional principles by the exaction of an exorbitant return in an unrelated field of commerce. Not until, to pursue our figure of speech, one container is substituted for two—a tank for separated pails,—does the revenue intake upon either side produce a direct effect upon the resultant level. When the revenues of the carrier come to be drawn from commerce in the aggregate, no longer divided into classes, then the underproduction from that portion of commerce which had theretofore been separately classified might necessitate resort to the remainder, in order that a definite level or standard might be maintained. But until a

common standard is established, plainly power to remove discrimination is wholly irrelevant upon the issue of revenue production.

(3) Recognition by Interstate Commerce Commission of want of power.

Prior to the amendment of Section 13, the Commission had recogized that it possessed no power to resort to interstate commerce to make up deficiencies alleged to arise from intrastate commerce. Notwithstanding its expressed conviction that—

> "There ought always to be harmony between state and interstate rates of transportation by rail,"[107]

it was recognized quite as a matter of course, when the five per cent rate increase was sought at its hands, that:—

> "Pending the outcome of these efforts with the state commission, the higher rates, if permitted to become effective, would apply therefore only upon interstate shipments."[108]

More recently, the Commission said:

> "While we should permit reasonable interstate fares we cannot sanction fares that are higher than are reasonable for the service performed because intrastate fares are alleged or shown to be unduly low."[109]

(4) Views of counsel that Section 13 did not confer the power claimed.

Nor are the views of counsel of eminence and standing wanting to demonstrate that the section, as finally enacted, conferred upon the Commission no power such as claimed.

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[107] *Cobb v. N. P. Ry. Co.*, 20 I. C. C. 100, 102.
[108] *The Five Per Cent Case*, 31 I. C. C. 351, 356.
[109] *Western Passenger Fares*, 37 I. C. C. 41.

(a) Opinion of Senator Cummins.

Plainly this was the view of Senator Cummins cited now not as evidence of legislative intent but as the opinion of an eminent lawyer. He stated:

> "We have tried hard and labored earnestly to preserve to the states all the authority that can possibly be preserved."

Again:

> "We have not attempted to carry the authority of Congress beyond the exact point ruled by the Supreme Court in the cases to which I have referred; and the only thing we have done in the matter has been to confer upon the Interstate Commerce Commission the authority to remove the discrimination, when established in a proper proceeding before that body—an authority which it does not now have."[110]

(b) View of Mr. Forney Johnston.

Distinguished counsel appear to have questioned whether granting power for the removal "of any undue burden upon interstate or foreign commerce" (the language of the original Esch bill, a provision broader than that with which we are dealing now) was sufficient to confer power "to make a horizontal order adjusting the level of rates within a given state to conform to like adjustments of the interstate rate level." At least, we must assume that the intention to confer this power was not so "clearly manifested" by the so-called Esch bill as to leave greater definiteness and certainty undesirable. We find the suggestion made:

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[110]Congressional Record, Vol. 59, Part 1, 66th Congress, 2nd Session, Dec. 1, 1919–Jan. 5, 1920, 138, 142.

"We propose extensions of its power that go beyond the suggestions of the Esch bill."[111]

"It is not proposed by the Esch bill, as I understand it, that the Commission be given any power whatsoever of initiation or advancing rates—except, perhaps, in isolated cases of discrimination."[112]

The exact nature of the extension of power desired coincides curiously enough with the quantity of power now claimed to exist, notwithstanding failure to procure the desired extension. Referring to the so-called Warfield Plan, we find it stated:

"A more concise statement of the situation is section 3, on page 10, to the effect that intrastate rates observed by carriers for like and contemporaneous and comparable service in transportation in interstate commerce, or for a like kind of traffic under substantially similar circumstances and conditions, must correspond with the level of interstate rates. 'All such lower intrastate rates or bases of rates, with the exceptions hereinafter authorized, are hereby declared to discriminate against and unlawfully burden interstate commerce, by reason of such relation, without reference to the reasonableness per se of the respective rates or level of rates, or any question of specific discrimination as against interstate points, localities or individuals.' That proviso is suggested as a result of the Shreveport decision, and, following that, the Illinois case, which seem clearly to point out the necessity, before there can be any action upon intrastate rates by the Interstate Commerce Commission, for showing that there is discrimination between localities, or particular classes, or commodities, or shippers; the Interstate Commerce Commission must be

[111]Hearing before the Committee on Interstate and Foreign Commerce of the House of Representatives, 66th Congress, 1st Session, on H. R. 4378. Testimony of Mr. Forney Johnston, 1036.

[112]*Id.*, 1037.

able to point out a specific discrimination as against an interstate locality, individual or commodity. Unless they are able to show that in sufficient detail to make a definitive order as to those certain, particular rates, it is doubtful if they have the power to bring about general adjustments. We think the Esch bill contemplates general burdens and extends that doctrine.

"It is also our recommendation that the mere difference in relation between comparable rate levels within a state to the interstate rate level most nearly corresponding is sufficient to show a burden upon interstate commerce."[113]

The Esch bill, as originally drawn, was thus interpreted:

"Mr. SANDERS of Indiana. I have my doubts on reading the bill, whether you have done much more than draw a declaratory statute of the Shreveport case. I think that is what the Esch bill does.

"Mr. JOHNSTON. If you will pardon me, I think it goes *a little further* in expressly giving the commission authority in case of a general burden, in addition to the necessity of showing some specific discrimination against a specific locality or class or commodity, and it very generally meets the criticism of the Supreme Court of the order in the Illinois case, which required the commission to specify the items to be changed and to localize the discrimination."[114]

(c) Argument of Mr. Alfred P. Thom.

Counsel equally eminent appears to have doubted whether the Esch bill with its broader provision was sufficient to work the change in jurisdiction necessary to sustain the challenged order. The committee was

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[113] *Id.*, 1077–78.
[114] *Id.*, 1080.

favored with a rather full explanation of theory, and concrete suggestions were made of amendments necessary to put the theory into effect.

"So that it is important in determining this matter to consider the burden of sustaining the instrument of interstate commerce and of the fair and equitable distribution of that burden on all who use the same instrument of interstate commerce.

"There is involved here not a mere matter of discrimination of a state rate against an interstate rate, as in the Shreveport case, but, in addition to that, there is a large public interest in favor of having the burden of sustaining the instrument of interstate commerce up to the standard fixed by Congress equitably distributed among all the users of that instrument.

"How can that be equitably distributed unless there is one controlling authority to make the whole distribution? You can not have 49 people distributing this burden—one the general government and 48 states—and expect equality. You can only have it distributed by one.

"What is the proper authority to do that? Is it not the government that represents all the states and all the people and to which has been confided the power to regulate interstate commerce?

"So that we hope that, in your legislation, you will not merely deal with the questions of discriminations, but you will deal also with the equitable distribution of the burden of sustaining the instrument of interstate commerce. If the bill, commonly known as the Esch bill—I do not remember its number—is to be adopted on that subject, we shall ask that the clause relating to that subject be amended.

"The CHAIRMAN. It is section 13, Mr. Thom.

"Mr. THOM. Yes, sir; by inserting before the word 'which,' in line 1, on page 23, the following: 'or any undue inequality in the rates and fares, charges, classifications, regulations, or practices as between interstate and intrastate traffic, respectively.'

"*That is suggested for the purpose of enabling the Interstate Commerce Commission to fairly distribute the burden, as well as to defend interstate traffic against discrimination.*"[115]

The phrasing which counsel then appeared to have thought essential was the following:

"The commission shall have authority, after full hearing, to make such findings and orders as may in its judgment tend to remove any undue preference or prejudice as between persons or localities in state and interstate or foreign commerce, or any undue burden upon interstate or foreign commerce '*or any undue inequality in the rates and fares, charges, classifications, regulations, or practices as between interstate and intrastate traffic, respectively,*' which is hereby forbidden and declared to be unlawful, and such findings or orders shall be observed while in effect by the carriers parties to such proceeding affected thereby, any act, decision, or order of any state or state authority to the contrary notwithstanding."[116]

Unless, therefore, the rejection of plain and specific provision for the extension of power is to be treated as actually bringing such extension about, we must necessarily look elsewhere for the source of this new and radical power.

Section 13 creates no such power.

"It is but declaratory of the law as it stood before."[117]

(5) Statement of standard text writer.

"The principle announced in the Shreveport case, *supra*, has been followed by the Commission

[115] *Id.*, 1230. Testimony of Mr. Alfred P. Thom. There is obviously a misprint in the text, which should read: "line 23, page 21," instead of "line 1, page 23."

[116] H. R. 4378, 21.

[117] *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 470.

and the courts and there has been a constantly increasing recognition of the propriety of the decision. So far is this true that the act of 1920 makes statutory the Courts' construction of the original Commerce Act."[118]

"Paragraph 3, to Section 13, added by Transportation Act 1920, section 416. The procedure here authorized is substantially that which the Commission had theretofore followed."[119]

"This provision, being paragraph 4 of section 13 contained in Transportation Act 1920, Section 416, adds nothing to the authority fully sustained in the Shreveport case, section 41, *ante*."[120]

c. By Section 15 Congress gave to the Interstate Commerce Commission power to fix reasonable interstate rates. By section 15a it established "a rule of rate making"—the manner of exercising the power granted by Section 15.

Into an act whose subject matter is interstate commerce, Congress wrote an amendment giving power to fix reasonable rates for transportation in that commerce and added "a rule of rate making" for the guidance of the Commission in the exercise of the newly created power. This rule for the exercise of power within a jurisdiction defined did not operate to enlarge the scope of the jurisdiction.

"The views we have expressed seem to us to be founded on such plain and practical principles as hardly to need any labored argument in their support. We may mistify anything. But if we take a plain view of the words of the '*statute*,' and give to them a fair and obvious interpretation, we cannot fail * * * of coming to a clear understanding

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[118] *Watkins on Shippers and Carriers*, Vol. 1, sec. 44, 236.
[119] *Id.*, Vol. II, sec. 393A, 1111.
[120] *Id.*, Vol. II, sec. 393B, 1112.

of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation."[121]

These are the words of the statutes upon whose surface meaning lies:

"Section 1. (1) That the provisions of this Act shall apply to common carriers engaged in—

"(a) The transportation of passengers * * * from one State or Territory of the United States * * * to any other State or Territory of the United States * * *.

"(2) The provisions of this Act * * * shall not apply—

"(a) To the transportation of passengers or property * * * wholly within one State * * *.

"(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto * * *.

"(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful * * *."

"Sec. 15. (1) That whenever, after full hearing, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge * * * for the transportation of persons or property * * * as defined in the first section of this Act * * * is or will be unjust or unreasonable, * * * the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge * * *."

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[121] *Ex Parte Siebold*, 101 U. S. 371, 393. "Statute" substituted for "constitution."

"Sec. 15a. * * * (2) *In the exercise of its power to prescribe just and reasonable rates* the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole * * * will earn * * * a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation * * *."

"* * * No resort to exposition can add to the cogency with which the conclusion stated is compelled by the plain meaning of the words themselves."[122]

If Section 15a were a grant of power, there might be room for the contention carriers make. But plainly it is not a grant, but a regulation or limitation of power. The grant of power is made by Section 15. Counsel correctly say:

"Congress for the first time placed the Interstate Commerce Commission under the mandate of prescribing in the first instance the rates applicable to that portion of the commerce which was *interstate*."[123]

The purpose of 15a was thus set forth by the Conference Committee:

"RULE OF RATE MAKING

(Section 422 of the Conference Bill)

The House bill continued the existing law authorizing the Interstate Commerce Commission to prescribe just and reasonable rates. Section 6 of the Senate amendment added *to the just and reasonable rule a requirement that the rates must be adequate to enable the carriers* as a whole to earn a fair return on the aggregate value of their property."[124]

[122] *Proctor & Gamble Co. v. U. S.*, 225 U. S. 282, 293.

[123] *Brief of Messrs. Scott and Burgess*, 37.

[124] Statement of Managers on the Part of the House submitted with conference report on H. R. 10453, Congressional Record, 66th Congress, Second Session, 1920, Vol. 59, Part 4, 3265.

"It is clear that this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions."[125]

Section 15a fixes the meaning of a reasonable return at a specified percentage of property values. It further directs that such return shall be computed not upon the property of an individual road or carrier, as a separate unit, but upon the property used by all roads, the plain implication, of course, being their property used in interstate commerce. By the use of the term "aggregate," it was merely intended to emphasize the plan or scheme of treating all property as belonging to one carrier, instead of many. There is nothing to indicate that the term was intended to have other significance than this. Senator Cummins repeatedly expounded the theory that underlay the scheme:

"Suppose there were but a single railroad in the United States, just one."[126]

The exercise of power over a given subject matter is not extended to include other matters, simply because general words are employed in describing factors common to an excluded class, as well as that included within jurisdiction. So that were there nothing more than these two sections standing alone, it could not be urged successfully that Section 15a required the inclusion of those property values devoted to intrastate commerce.

But in addition to the proposition that all that is done pursuant to Section 15a must be within the scope

[125] *Savage v. Jones*, 225 U. S. 501, 533. *Corn Products Refining Co. v. Eddy*, 249 U. S. 427, 439.

[126] Congressional Record, Vol. 59, Part 1, 66th Congress, Second Session, Dec. 1, 1919–Jan. 5, 1920, 137.

of what may be done under section 15, we have a direct restriction upon the meaning of Section 15a. The terms of section 1 are plain. They refer to all the provisions of the act. Section 15a is one of those provisions, and we are not at liberty to assume that, speaking at page 36 of the Transportation Act, Congress had forgotten the plain declaration of its self-imposed limitation upon page 20; that "the provisions of this act shall not apply to transportation wholly within one state." We must presume that Congress thought it unnecessary to repeat this language in every separate section and provision, especially in view of the rule that its intention to include intrastate commerce must be "clearly manifested."

In determining whether language creates jurisdiction in an administrative tribunal or sets up a rule for guidance within jurisdiction, the situation is converse to that presented when the question arises in the case of a court of general jurisdiction:

> "Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power."[127]

In the case of a court of general jurisdiction presumption is against the *limitation* of jurisdiction. In the case of an administrative tribunal the presumption is against the *extension* of jurisdiction. The result as we construe the decisions is that words will be read unless a contrary meaning is clear so as to prevent limitation of the jurisdiction of a court and so as to deny extension of jurisdiction in case of an administrative board. It has been said:

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[127] *Fauntleroy v. Lum*, 210 U. S. 230, 235.

"The difficulty of distinguishing between a rule of law for the guidance of a court and a limit set to its power is sometimes considerable. Words that might seem to concern jurisdiction may be read as simply imposing a rule of decision, and often will be read in that way when dealing with a court of general powers. *Fauntleroy v. Lum*, 210 U. S. 230, 235, 52 L. ed. 1039, 1041, 28 Sup. Ct. Rep. 641. But even in such a case there may be a difference of opinion (*id.* 245), and when we are dealing with an administrative order that seriously affects property rights, and does so by way rather of fiat than of adjudication, there seems to be no reason for not taking the proviso of the statute in its natural sense."[128]

While the sentence last quoted employs "proviso" in a different sense, the language most effectively and accurately phrases our conception that "there seems to be no reason for not taking the proviso of the statute in its natural sense" in the present case.

To our minds, the most singular thing in the discussion of the present action, in the briefs on file and in oral argument before the court, is the practical rejection of all consideration of section 1 as having significance or bearing upon the case. In four hours of oral argument on behalf of appellee, this section, commonly called the proviso, was never once referred to, and in briefs and arguments submitted to sustain the validity of the order, aggregating 308 pages in length, approximately two and one-half pages are devoted to the "proviso," and the discussion so plainly misapprehends appellants' position as to be of no aid to the court. In reliance upon the Shreveport case and upon the supposed expansion of authority

[128] *Interstate Commerce Comm. v. Northern P. R. Co.*, 216 U. S. 543, 545.

in paragraphs (3) and (4) of section 13 of the Interstate Commerce Act, counsel concluded:

> "In the face of this direct expression of Congress, the suggestion is plainly untenable that the retention in the Transportation Act, 1920, of the proviso to section 1 of the Interstate Commerce Act as previously existing has significance or importance as to the questions involved in this case."[129]

Argument directed to the construction of the proviso in the brief already filed will not be repeated. No contention is made that the "proviso" operates as a restraint upon the power of the Interstate Commerce Commission to remove discrimination. It is expressly and freely admitted that it works no limitation upon power arising under the terms of section 13. Any state action which produces unjust discrimination against interstate commerce may and must be removed by the Commission, when that fact is made to appear in a proper proceeding.

The proviso does render void an order of the Commission of the nature herein challenged, not because it restrains the removal of discrimination, but because its proper application makes it impossible to find that the facts and circumstances shown in this case constitute discrimination under the law,—this because, as already fully demonstrated, the proviso renders impossible a construction that Congress has unified control over commerce, removing the distinction between the two classes, theretofore existing, and making possible a legal relation between rate productivity in the two phases of transportation.

When Congress came to reenact, the proviso, if we may borrow the vocabulary of appellee, it "plainly

[129] *Brief of Mr. Alfred P. Thom*, 49.

intended" to preserve state power over intrastate rates. If this was not its intention, there is practically nothing at all upon which the proviso could operate. The extent to which state functions had been absorbed in the regulation of security issues, in arbitration of wage disputes, as to car service and distribution, is well illustrated in counsel's brief.[130]

The process has gone on to such an extent that unless the proviso is intended to except the power of rate making from the control of the commission, there is virtually nothing which it does except, and it is a purely meaningless thing. It becomes, as suggested upon oral argument, a monument to the resting place of state power, instead of a living sign post to mark the limits and the vitality of state power preserved.

How, we ask, could Congress have expressed its intention otherwise, assuming that it intended to set up a rule of rate-making and a direction to compute return upon the combined, instead of the individual property of carriers devoted to interstate commerce? Interstate commerce was the subject matter of the act. It was the only thing directly committed to the regulation of Congress by the constitution, and the plain and necessary effect of any language used would be confined to that commerce, in the absence of clear expression to the contrary.

But assuming counsel to be correct in saying—

> "The Commission is required to find the aggregate value of the property * * * and is not permitted to exclude any part of it because used for state transportation,"[131]

[130] *Brief of Messrs. Scott and Burgess*, 31–33.
[131] *Brief of Mr. Alfred P. Thom*, 46.

associate counsel furnishes a complete answer to the contention, if it be correct.

> "In all of its former decisions wherein the Commission had passed upon the revenue requirements of the carriers as the basis for proposed general increases in interstate rates, the Commission had determined the revenue needs from statistics embracing all revenues, operating expenses and property values, without segregation between interstate and instrastate transactions."[132]

In its decisions ranging from 1903 to 1917, the Commission in fixing interstate rates had always followed exactly the procedure now prescribed. Surely there is no room for the inference that alteration of the scope of its jurisdiction was intended, because by statute it was told to do that which it had always done.

> "While the instant case transcends all that have preceded it in the magnitude of the sums involved and the spontaneity and universality of its precipitation, it is in its essential characteristics and fundamental factors identical with other great rate-increase cases which have been considered."[133]

The duty lay upon the Commission to discharge the mandate of Congress in dealing with interstate rates, and when it had carried out the direction of Congress, its functions were at an end.

CONCLUSION

To our minds, the situation is ruled by language which the court employed when it denied the power of the Commission to fix interstate rates. We make this language ours:

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[132] *Brief of Messrs. Scott and Burgess*, 78.
[133] *The Fifteen Per Cent Case*, 45 I. C. C., 303, 316-317.

"The question debated is whether it vested in the Commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication."[134]

All of which is respectfully submitted.

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[134] *I. C. C. v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 494–495.

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Supreme Court of the United States

OCTOBER TERM, 1920.

206

No. 694—IN EQUITY.

RAILROAD COMMISSION OF WISCONSIN, ET AL.,
Appellants,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

SECOND SUPPLEMENTAL BRIEF FILED AMICI CURIAE ON BEHALF OF FORTY-TWO STATES.

FOR THE RAILROAD AND UTILITIES COMMISSIONS OF FORTY-TWO STATES,
JOHN E. BENTON.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

SECOND SUPPLEMENTAL BRIEF FILED AMICI CURIAE ON BEHALF OF FORTY-TWO STATES.

The Commission Made an Order Advancing All Passenger Rates in Wisconsin Without Having Found All Such Rates Discriminatory.

(*a*) *Argument on this Point in Original Brief.*

In the original brief filed *amici curiae* on behalf of forty-two states (not including the State of Wisconsin) at page 126 we said:

"The Commission's misconstruction of the true purpose of section 15-a as to uniformity of rates produced the order complained of in this case. We have before called attention to the entire failure of the Commission to make definite the persons and localities, if any, injured by the intrastate rates sought to be displaced by its order. If the Commission found all intrastate passenger fares in Wisconsin in fact discriminatory it would undoubtedly, in view of the decision of this court in *Illinois Central Railroad* v. *Public Utilities Commission*, 245 U. S. 493, before cited, have clearly stated that finding, as it might easily have done. Instead, however, it has expressly left open the question of what rates are discriminatory and what rates are not discriminatory. This will be seen upon an examination of what the Commission did say. To make such examination of the Commission's utterances in their entirety it is necessary, as has already been pointed out, to go beyond the Wisconsin report. * * *

Thus the Commission on its own statement has not considered the particular rates which it has ordered advanced, but has included all rates in its order, without knowing whether they should all be advanced or not. This it attempts to excuse upon the ground of lack of time, and rather graciously permits the state to come before it and prove what rates ought not to have been advanced.

We maintain that this is a clear violation of the Act. Before the Federal Government can set aside intrastate rates upon the ground that they injure interstate commerce, it must be found as a fact that they do produce such injury. * * *

This admission, made in the New York case, and incorporated by reference thereto in the report in this case, as well as in other state cases, that

the Commission regarded carriers' needs for revenue as too imperative to permit the finding to be made, and that hence it advanced all rates, leaving the state to seek a modification of the order as to rates not in fact discriminatory, renders the order invalid."

(*b*) *Statement of Purport of Order Confirmed by Commission.*

What we said in our original brief, as above quoted, as to the purport of the Commission's order in this case, has been confirmed by the Commission itself by discussion in another case since decided, which we desire to cite. Before making such citation, however, in order that the application of such discussion, as an aid in the interpretation of the order in this case, may be clear, we must set out a paragraph which has been inserted in the Commission's order in this case, by an amendment made since the argument herein. The amendment was made March 29, 1921, and the paragraph inserted was as follows:

"*It is further ordered,* That nothing in this order shall be construed as requiring any common carrier to establish, put in force or maintain any rate, fare or charge for the transportation of passengers or property in intrastate commerce which is greater than its corresponding rate, fare or charge applicable to the transportation of passengers or property in interstate commerce from, to or at the same points in effect on said 27th day of November 1920, or greater than its corresponding rate, fare or charge contemporaneously in effect and applicable to the transportation of passengers or property in interstate commerce."

A similar paragraph has also been inserted by amendment in each order advancing intrastate rates which had been previously made by the Commission, and in each original order of like character since made by the Commission, including the order in *Kansas Rates, Fares and Charges*, 62 I. C. C. 440, decided July 6, 1921.

This Kansas case is the one we desire to cite. The following is quoted from the majority report:

> "It was also developed by the Court of Industrial Relations that there are practically no joint class rates in Kansas, nor from Kansas City or St. Joseph, Mo., into Kansas. As most of the roads in Kansas reach Kansas City and St. Joseph, Mo., with their own power, jobbers at those points can reach almost all points in the state by a one-line haul; that is, they can deliver their traffic to the road which reaches the destination to which they desire to ship, but as all roads in Kansas do not serve all distributing points in the state, jobbers who ship to a destination on a road which does not serve the point where they are located must pay the combination of locals. These combinations are much higher than the single-line rates for equal distances from Kansas City and St. Joseph, Mo., and, incidentally, much higher than the joint rates for equal distances within Missouri. * * *
>
> Many rates on live stock from Kansas points are relatively higher to Wichita, Kansas, than to Kansas City, Missouri. For instance, for a 61-mile haul the rate on horses to Wichita is $37.50 per car, while Kansas City pays $31.50 for a haul of similar length. The rates to Kansas City are specific rates, while those to Wichita are based on the intrastate mileage scale, which has general

application. On lumber, Wichita pays 29.5 cents for an intrastate haul of 250 miles. Kansas City, Missouri, can ship that distance into Kansas on a specific rate of 24.5 cents. On broom corn, which it draws from points in Kansas, Wichita must generally, except for short hauls, pay the same rate from a given point as Kansas City, Missouri, although the distance to the latter point is much greater. This is due to the fact there are specific commodity rates from the producing points to Kansas City, while the general intrastate mileage scale, providing rates relatively higher, applies to Wichita, but the mileage rate to Wichita is not used where it exceeds the specific rate to Kansas City. It is noted that on broom corn from Elkhart, Kansas, for instance, the rate to Kansas City and Wichita is 59.5 cents per 100 pounds. The distance from Elkhart to Wichita is 300 miles, and to Kansas City 459 miles. Wichita is the largest broom-corn market in the world. About 90 per cent of the tonnage goes into storage and is later shipped out on the basis of the through rates from point of origin to final destination.

Included in the criticisms made by the Court of Industrial Relations are the rates on grain from Collyer, Kansas, to Kansas City, Kansas, versus the rates to Chicago, Illinois. To Kansas City, Kansas, 334 miles, the rate is 23.5 cents and the earnings per ton-mile 14 mills. To Chicago, 792 miles, the rate is 44 cents and the earnings 11.1 mills per ton-mile. The distance to Chicago is 237 per cent of that to Kansas City, Kansas, whereas the rate to Chicago is 187 per cent of the rate to Kansas City, Kansas. It is pointed out that if the ton-mile earnings on the intrastate rate, remain constant for application to the

interstate haul, the rate to Chicago would be 56 cents. On salt from Hutchison to Phillipsburg, Kansas, 322 miles, the rate is 23.5 cents, yielding 14.6 mills per ton-mile, while from Hutchinson to Centaur, Missouri, 489 miles, the rate is only 3 cents higher, or 26.5 cents, yielding slightly over 10.8 mills per ton per mile. The interstate haul is 152 per cent of the intrastate haul, but the interstate rate is 104 per cent of the intrastate rate. On coal from Pittsburg to Hutchison, Kansas, 216 miles, there is an intrastate rate of $2.40 per ton, yielding 11.1 mills per ton-mile, which is cited in comparison with a rate of $2.16 per ton from Henrietta, Oklahoma, to Neodesha, Kansas, 230 miles, yielding 9.4 mills per ton-mile. A rate of $1.85 per ton on coal for a haul of 185 miles from Springfield to Chicago, Illinois, yielding 10 mills per ton-mile, is compared with the rate of $2.05 per ton for a haul of similar length from Pittsburg to Wichita, Kansas, yielding 10.7 mills per ton-mile. Several instances are shown in which there are less-than-carload commodity rates from Kansas City, Missouri, to points in Kansas on sugar, coffee, canned goods, beans, and sirup, from 1.5 to 3.5 cents lower than for equal distances in Kansas.

Many other instances were shown by the Court of Industrial Relations where the rates are relatively higher intrastate than interstate. * * *

In many instances the Kansas intrastate rates (on cement) at present in effect—that is, without the increases sought by the carriers in this case—are for equal distances as high as, or higher than, the interstate rates to, from, and through the state; and if the increases sought are made, the Kansas mills as to intrastate traffic will, of course, be at a still greater disadvantage.

> It the intrastate rates are increased to the extent sought by the carriers, many intrastate rates will exceed the interstate rates, even between the same points in Kansas. The interstate rates applicable between points within the state of Kansas via intrastate routes are nothing more nor less than proportional rates. However, in this connection we may call attention to the amended orders in several intrastate cases that have been before us, which provide that no carrier is required to maintain a higher intrastate rate than its corresponding interstate rate. * * *
>
> With an order in this case conforming to the amended orders in previous cases—that is, providing that a carrier is not required to maintain any higher intrastate rate than the interstate rate applicable via intrastate routes between the same points—difficulties of the kind referred to could be avoided." *Kansas Rates, Fares, and Charges*, 62 I. C. C. 446-450.

From the action of the majority in the Kansas case Commissioners Eastman, Campbell and Lewis dissented. It may perhaps be well to recall that the Kansas case was the first intrastate rate case in which the two last mentioned Commissioners were called upon to act.

Commissioner Campbell based his dissent upon the same ground as that stated by Commissioner Eastman in his dissent in the New York case. Commissioner Lewis, however, agreed with the majority of the Commission as to the power of the Commission to review the reasonableness of intrastate rates, but nevertheless dissented from the order of the Commission on grounds stated in part as follows:

"I concur, therefore, in the action of the majority in the matter of all such rates, fares, and charges which not only are violative of the prohibition against unjust discrimination and undue preference or prejudice, but which also fail to meet the requirements of section 15a.

However, there is in Kansas a great body of freight rates prescribed by state authority that are higher than corresponding interstate rates. * * *

The transportation services whether pertaining to interstate or intrastate commerce are found to be performed under substantially similar circumstances and conditions. How, then, in such instances where the interstate shipper now pays a relatively lower rate than the intrastate shipper, can it be found that he is subjected to undue prejudice, or that free movement of interstate commerce is impeded or that such rates result in a burden being laid on interstate commerce?

I am not unmindful of the provision that nothing in the order shall be construed as requiring any common carrier to establish, put in effect, or maintain any rate, fare, or charge for the transportation of passengers or property in intrastate commerce which is greater than its corresponding rate, fare, or charge applicable to such transportation in interstate commerce. This, however, does not fully meet the situation in at least several respects, which need not be discussed here.

It is my opinion that the Commission goes too far when, encountering such a situation, it sweepingly condemns practically the entire state rate structure and issues an order, the effect of which is to set aside or cripple state authority that, except in the case of certain rates which can be

isolated and dealt with separately, does not appear to have been exercised in a manner unfair to the railroads, or—except in such instances—has not failed to cover its part of the maintenance, operation, and success of the national or group transportation system. * * *

The most unfortunate effect of such sweeping condemnation of all state rates is the prostration of state authority. The effect is to create a situation in which local facilities for readjusting state rates to the level of interstate rates are seriously disturbed, if not destroyed." *Kansas Rates, Fares, and Charges*, 62 I. C. C. 461-463.

Reading, then, the order of the Commission in this case, as the same is set out in the record, in the light of the later amendment of the same by the Commission, and in the light of the discussion of the purpose of the language contained in the amendment, it would seem conclusively to appear that the Commission has never found all passenger rates in Wisconsin to be discriminatory, although, in the order which is before the court, it attempted to require all of said rates to be advanced.

(c) The Effect of the Order as Amended.

If the order be considered in its amended form, it is even more indefensible than the order set out in the record, for, as amended, it is nothing more than an attempt to delegate to the carriers power to determine what passenger rates in Wisconsin are discriminatory, within the meaning of that term, as vaguely indicated (rather than defined) by the Commission in its report, and power also to determine the extent to which the rates considered discriminatory by the carriers shall be advanced to remove the discrimination.

If it be assumed that the Commission has jurisdiction to pass upon the reasonablenes of intrastate rates, so that an unreasonably low rate applicable to intrastate traffic may be held an "unjust discrimination against interstate commerce," within the intent of those words as used in Section 13 (4) of the Interstate Commerce Act, as amended by the Transportation Act, still the question of discrimination "would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts (or the carriers). The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court (or the carriers) without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it." (*Minnesota Rate Cases*, 230 U. S. 352, 419, 420.)

The words "or the carriers" inserted in parentheses in the language just quoted are, of course, not in the language used by the court, but that the Commission can not delegate to the carriers the decision of questions which this court has held are primarily for the Commission's "own investigation and determination" appears to us too patent for argument.

For the Railroad and Utilities Commissions of Forty-two States.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, [redacted] 1921

No. [redacted]4206

RAILROAD COMMISSION OF WISCONSIN, et al.,
Appellants,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellee.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

REPLY TO SECOND SUPPLEMENTAL BRIEF FILED BY AMICI CURIAE ON BEHALF OF CERTAIN STATE COMMISSIONS.

BRUCE SCOTT,
KENNETH F. BURGESS,
Solicitors for Appellee.

FRED P. THOM,
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W. DYNES,
W. SARGENT,
Of Counsel.

CHICAGO, ILLINOIS, October 15, 1921.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 694

RAILROAD COMMISSION OF WISCONSIN, et al., *Appellants,* vs. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Appellee.*	Appeal from the District Court of the United States for the Eastern District of Wisconsin.

REPLY TO SECOND SUPPLEMENTAL BRIEF FILED BY AMICI CURIAE ON BEHALF OF CERTAIN STATE COMMISSIONS.

In his second supplemental brief, counsel for certain *amici curiae* discusses at some length the decision of the Interstate Commerce Commission in a proceeding involving freight rates in the State of Kansas. The circumstances to which he directs attention are peculiar to the freight rate adjustment in that state and have nothing to do with the mileage fares for passenger travel in the State of Wisconsin. The latter are on a uniform basis per mile.

We assume that the court will deal with the Kansas freight rate situation when presented on a proper record. The case now before the court involves only passenger fares within the State of Wisconsin in their relation to interstate fares. As to interstate fares within Wisconsin, the Interstate Commerce Commission found "three cents per mile is the basis, initiated by the President" (Rec., 46), and as to their relation to interstate fares the Commission found:

> "The interstate passenger fares in the region that includes Wisconsin are in general on a basis of 3.6 cents per mile as maximum." (Rec., 46.)

In the second supplemental brief, counsel repeats his argument made orally to the court, that the Interstate Commerce Commission did not find unjust discrimination to exist as to *all* intrastate fares. In this he disregards the record before the court.

We find it stipulated of record that the passenger fare tariffs of the carriers, offered in evidence, which increased all intrastate fares in Wisconsin to the level of the interstate fares, namely, to the interstate basis of 3.6 cents per mile, "were put in force under and pursuant to the terms of said order of the Interstate Commerce Commission, and are authorized thereby and fully comply therewith." (Rec., 25.) The report of the Commission upon which the order was based was made a part of said order by direct reference therein. (Rec., 50.) That the Commission's order included all intrastate fares was the principal basis of attack thereon by the State of Wisconsin. Thus counsel for the State of Wisconsin commenced the argument in his brief with the following sentence:

> "The Interstate Commerce Commission made an order fixing all rates for Wisconsin intrastate passenger transportation by interstate carriers.' (Brief for Appellants, page 8.)

The discrimination which the Commission found to exist in its report and condemned in its order was the discrimination caused by the uniform disparity throughout the state between intrastate and corresponding interstate passenger fares. The Commission found that undue preference to intrastate travelers resulted from this disparity, with concurrent unjust discrimination against interstate travelers and interstate commerce itself. The finding of the Commission in respect to the scope of the unjust discrimination is described in terms as definite and direct as language could make it, as evidenced by the following paragraph from the report:

> "Following the New York and Illinois cases, and upon this record, subject to the exception above noted in respect to commutation or other multiple forms of tickets, excursion, convention, or other fares for special occasions, and club car charges, we are of opinion and find that the increases made by respondent steam railroads under *Ex Parte* 74, relalating to passenger fares and baggage charges, and now in effect, result in reasonable passenger fares and excess baggage charges for interstate transportation within the group considered in this proceeding, and that the failure of said respondents to increase the standard intrastate fares and charges correspondingly within the State of Wisconsin has resulted and will result in intrastate fares and charges lower than the corresponding interstate fares and charges; in undue prejudice to persons traveling in interstate commerce within the State of Wisconsin, and between points in the State of Wisconsin and points in other states; in undue preference of and advantage to persons traveling intrastate in Wisconsin; and in unjust discrimination against interstate commerce." (Rec., 48-49.)

Read in connection with the other findings set forth at pages 55 to 60 of our original brief, we submit that the Commission's report and order are not capable of any other interpretation than that they embrace all fares

within the State of Wisconsin on a lower basis than the corresponding interstate fares.

Counsel also characterizes a paragraph of the order in the Wisconsin case, added by the Commission subsequent to the submission of this cause in this court, as a delegation to the carriers of the Commission's function of determining the existence of unjust discrimination. The paragraph does no such thing. It is framed in the negative and is simply cautionary against a construction of its order which would lead to intrastate fares *higher* than corresponding interstate fares. No one contends for such a rate adjustment. The paragraph reads as follows:

> "It is further ordered, That nothing in this order shall be construed as requiring any common carrier to establish, put in force or maintain any rate, fare or charge, for the transportation of passengers or property in intrastate commerce which is greater than its corresponding rate, fare or charge applicable to the transportation of passengers or property in interstate commerce from, to or at the same points in effect on said 27th day of November, 1920, or greater than its corresponding rate, fare or charge contemporaneously in effect and applicable to the transportation of passengers or property in interstate commerce."

At most, under the facts of this case, it will be observed that it negatives a right to contend for that which no one in this proceeding has contended,—that the discrimination found to exist should be removed by advancing intrastate fares to a *higher* basis than interstate fares.

The mathematical determination of whether 3.6 cents is greater than 3 cents is not, as counsel seems to think, a question which can only be passed upon by the Interstate Commerce Commission.

The administrative question over which the Commission had sole jurisdiction was whether there was such a similarity of circumstances and conditions of transportation between interstate and intrastate travel as to make a disparity in corresponding passenger fares unjustly discriminatory against interstate commerce, persons and localities. It found that such unjust discriminations existed and ordered them removed by the establishment of mathematical parity. Its order is not to be impeached because as a cautionary measure it declared that no one should construe its order to authorize intrastate fares mathematically higher than corresponding interstate fares. In imposing on carriers the duty of restricting themselves to a mathematical parity, the Commission has done nothing more than to direct them to exercise the knowledge that every schoolboy has as to when one figure representing cents per mile is mathematically greater than another.

Neither is there any novelty in the form of the order. The Commission's orders in the *Shreveport Case*, 234 U. S. 342, and in *American Express Company* v. *Caldwell*, 244 U. S. 617, both of which were sustained by this court, made it incumbent upon the carriers to determine the same sort of mathematical facts in compiling their tariffs. Thus in the Shreveport case, we find that the Commission's order set forth in a footnote to the decision of this court (234 U. S. 342, at 347-348) required the carriers "to abstain from exacting any higher rates for the transportation of any article from Shreveport, La., to Houston, Tex., and points on its line intermediate thereto, than are contemporaneously exacted for the transportation of such article from Houston, Tex., toward said Shreveport for an equal distance, as said relation of rates has been found by the Commission in said report to be reasonable."

In *American Express Company* v. *Caldwell, supra*, this court in sustaining the Commission's order there under consideration recognized the propriety of intrusting mathematical calculations to the carrier. In the Commission's order this court said:

> "In its specific direction the order merely prohibits charging higher rates to and from Sioux City than to and from the five South Dakota cities. It could be complied with: (a) by reducing the interstate rates to the South Dakota scale, or (b) by raising the South Dakota rates to the interstate scale, or (c) by reducing one and raising the other until equality is reached in an intermediate scale." (244 U. S. 617 at 624.)

The second supplemental brief adds no new points to the argument previously presented at so great length by counsel for the *amici curiae* through the indulgence of the court.

Respectfully submitted,

BRUCE SCOTT,
KENNETH F. BURGESS,
Solicitors for Appellee.

ALFRED P. THOM,
R. V. FLETCHER,
O. W. DYNES,
F. W. SARGENT,
Of Counsel.

CHICAGO, ILLINOIS, October 15, 1921.

MAR 14 1921
JAMES D. MAHER,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. [redacted]206 EQUITY.

RAILROAD COMMISSION OF WISCONSIN, ET AL.,
Appellants,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

SUPPLEMENT TO BRIEF FILED AMICI CURIAE ON BEHALF OF FORTY-TWO STATES BY THEIR ATTORNEYS GENERAL AND OTHER COUNSEL AND BY THEIR RAILWAY AND UTILITIES COMMISSIONS.

For the Railroad and Utilities Commissions of Forty-two States,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 694—IN EQUITY.

RAILROAD COMMISSION OF WISCONSIN, ET AL.,
Appellants,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

SUPPLEMENT TO BRIEF FILED AMICI CURIAE ON BEHALF OF FORTY-TWO STATES BY THEIR ATTORNEYS GENERAL AND OTHER COUNSEL AND BY THEIR RAILWAY AND UTILITIES COMMISSIONS.

INSERT ON PAGE 168.

At the end of the first paragraph on page 168 of our brief heretofore filed, we desire to insert the following paragraphs:

Undue Increase in Passenger Rates Imposed Through Disregard of the Provisions of the Act.

The injury which has been done to the rate payers of the group in which Wisconsin lies by the failure of

the Commission to obey the law as to finding the aggregate value in each rate group becomes very apparent from an inspection of the Commission's report in Ex Parte 74, which is a part of ths record.

The Commission found the aggregate value of the property of the Western and Mountain Pacific groups combined to be $8,100,000,000. (Record, p. 65.) Six per cent upon this amount would be $486,000,000.

In the year ended October 31, 1919, which was the year results of operations in which were analyzed to determine the revenue needs of carriers, the carriers actually earned $293,000,000. (Record, p. 72.) The carriers, however, made certain adjustments to reflect increased expenditures, aside from the prospective award of the Labor Board, and reduced these earnings by estimate to $185,000,000. (Record, p. 72.)

The Commission appears to have accepted this estimate, and for present purposes we accept it. Deducting this $185,000,000 from the $486,000,000 needed to allow 6 per cent upon the value found by the Commission, we have $301,000,000 necessary to be produced by rate increases. This amount, however, did not include allowance for the award made by the Labor Board on July 20, 1920. This award, the carriers estimate, would add approximately $234,840,000 for Western territory (including the Western and Mountain Pacific groups). (Record, p. 74.)

The Commission appears to have accepted this estimate, and for present purposes we do. Adding the amount of the same to the $301,000,000 just above mentioned, the entire amount to be produced by increases in rates becomes $535,840,000.

In discussing their needs, the carriers estimated that $350,000,000 could be obtained by increasing the

freight revenue 24 per cent. If this was true, then the entire $835,800,000 could have been obtained by raising freight revenues 37 per cent.

The passenger revenues for Western territory (embracing both groups) as shown by Wettling's Exhibit No. 1, offered by the carriers, was $461,662,997 for the year under consideration, and the freight revenues for the same period $1,475,695,163.

The difference between 37 per cent and 35 per cent of this freight revenue is $29,513,903, which is 6.4 per cent of the passenger revenue.

Accordingly, upon the figures which the carriers themselves produced, the maximum increase which should have been imposed upon passenger traffic in Western territory was 6.4 per cent, and yet the Commission divided that territory, and without figures to show what the increase in passenger revenue ought to be, increased passenger rates in the group in which Wisconsin lies, not 6.4 per cent, but 20 per cent. This was making rates by guess work and in disregard of the law. We say that upon the basis of such a proceeding no valid order could be made displacing the intrastate rates fixed by the laws of Wisconsin."

INSERT ON PAGE 115.

At the end of the second paragraph on page 115 of our brief heretofore filed, we desire to insert the following paragraphs:

Change of Traffic from Interstate to Intrastate Imposes no Burden on Interstate Commerce.

We maintain that a state rate may not be found to be discriminatory merely from the fact that it results

in a cessation of interstate traffic and the movement of the same persons or goods in intrastate traffic, for the reason that the transportation desired can thereby be more cheaply obtained. It is obvious that the state rate which is taken advantage of does not impede commerce between the states. As to the particular traffic which thus changes its character, movement is in fact facilitated. Neither does the state rate, nor the change in character of the movement of traffic which it causes, place any burden upon interstate traffic. It does decrease the revenues earned from interstate traffic, but it decreases in like proportion the amount of property upon which interstate traffic must produce a return, and increases that upon which intrastate traffic must produce a return.

So long as the state upon each class of traffic allows a return sufficient to meet the requirements of the rule laid down in *Northern Pacific Railway v. North Dakota*, 236 U. S. 585, affirmed in *Vandalia Railroad v. Schnull*, decided Feb. 28, 1921, the state has a right to adjust its rates upon intrastate traffic as it likes, and if a fair return on the total value of property devoted to intrastate traffic is produced from all the rates on such traffic, there can be no burden resulting to interstate traffic from a change in character of a part of that traffic from interstate to intrastate.

It may further be observed that it lies within the power of the carrier to refuse to permit the breaking of an interstate journey into intrastate fragments. *M. K. & T. Ry Co.* v. *Ashinger*, (Supreme Court of Oklahoma, 162 Pac., 814; *Illinois Central R. R. Co.* v. *Holman* (Supreme Court of Mississippi), 64 So. 7.

It may also be said that if the change in character of interstate traffic to intrastate is deemed by Con-

gress an evil to be abated, regulations and penalties may be prescribed which will prevent it. This is particularly a matter for the practical judgment of Congress, and there is no evidence in the Act that Congress has yet recognized the existence of any evil of this character requiring to be remedied.

INSERT ON PAGE 101.

To remedy an ambiguous reference, we insert, at the end of the first paragraph on page 101 of our principal brief the following paragraph:

"When the conference bill was before the Senate, Senator Cummins, in explaining it, said:

INSERT ON PAGE 129.

At the bottom of page 129 we desire to insert the following paragraphs:

The Difficulty of Investigating Each of the Entire Body of Rates Within a State in a Single Proceeding Indicates the Unsoundness of the Commission's Construction.

Language which this court used in another case where the Commission sought to dispense with an investigation necessary to enable it properly to use the power which had been granted to it, is pertinent here. In *Texas and Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S., 197, the Court said;

> "It may be said that it would be impossible for the Commission to frame a general order if it were necessary to enter upon so wide a field of in-

vestigation, and if all interests that are liable to be affected were to be considered. This criticism, if well founded, would go to show that such orders are instances of general legislation, requiring an exercise of the law-making power, and that the general orders made by the Commission in March, 1889, and January, 1891, instead of being regulations calculated to promote commerce and enforce the express provisions of the act, are themselves law of wide import, destroying some branches of commerce that have long existed, and undertaking to change laws and customs of transportation in the promotion of what is supposed to be public policy."

FURTHER CITATIONS.

Interstate and Intrastate Commerce can not be Arbitrarily Linked Together.

In support of the above proposition, contained in our principal brief, we desire to cite the first *Employers Libility Case*, 207 U. S., 463, and to make therefrom the following quotation:

> "The act being addressed to all common carrirers engaged in interstate commerce, and imposing a liability upon them in favor of *any of their employes*, without qualification or restriction as to the business in which the carrier or their employes may be engaged at the time of the injury, of necessity *includes subjects wholly outside of the power of Congress* to *regulate commerce*. Without stopping to consider the numerous instances where although a common carrier is engaged in interstate commerce such carrier may in the nature of things also transact business not interstate commerce, although such local business *may indirectly be related to interstate com-*

merce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, *having a purely local branch operated wholly within a State.* * * * Take a telegraph company engaged in the transmission of *interstate and local messages.* Take an express company engaged in *local* as well as in interstate business. Take a trolley line moving wholly within a State as to a large part of its business and yet as to the remainder crossing the state line.

"As the act thus includes many subjects *wholly beyond the power to regulate commerce* and depends for its sanction upon that authority, *it results that the act is repugnant to the Constitution*, and can not be enforced unless there be merit in the propositions advanced to show that the statute may be saved. * * *

"It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refuse it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which can not be availed of except upon such conditions as Congress may prescribe, *even although the conditions would be otherwise beyond the power of Con-*

gress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, *would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures.*"

INSERT ON PAGE 178.

The Participation of State Commissioners in Ex Parte 74.

Inasmuch as both the Chief Counsel of the Commission and Mr. Scott, in their respective briefs, have referred to the participation of state commissioners in the hearing and consideration of Ex Parte 74, we deem it proper to make some reference to that matter.

It is not made clear in the briefs referred to what the purpose of the reference to such participation is. We assume that the design is to claim that the Commission has complied with the provisions of section 13 (3), which, as we interpret them, require the Federal Commission to offer opportunity for cooperation to the rate regulatory authorities of the state, in any case where the rate making authority of such state may be affected by the final order of the Federal Commission. We will answer that claim a little later.

If, however, it is the purpose to claim, expressly or by implication, that, because of such participation, the State of Wisconsin is now in any way precluded from determining to what extent, if at all, its local rates shall be advanced, we may say we think that claim is far from having any foundation.

The Wisconsin Commission did not take part in the joint hearing in Ex Parte 74. The individuals who make up the National Association of Railway and Utilities Commissioners chose a committee of three men, none of them from Wisconsin, who did sit. Furthermore, the intrastate rate situation in Wisconsin was in no way before the Commission in that proceeding. From this it appears to us quite clear that the action of the gentlemen who did sit, from the National Association, could have no legal effect upon the freedom of action of the Wisconsin authorities.

But it ought not to be argued that it has any moral effect upon the freedom of action of the Wisconsin Commission to administer the law of Wisconsin upon the facts as they appear in proceedings brought before that Commission. If that is done, it must necessarily render action by state officials under the cooperative provisions of section 13 (3) impossible, for no State Commission can surrender responsibility for its official acts into the hands of persons who do not compose such commission.

We believe it to be clear that it was not the intent of section 13(3) that entrance upon a joint conference or a joint hearing, even in a case strictly of the character described in that section, should have the effect to deprive the authorities participating of the power and the responsibility to exercise their functions, within their respective spheres, according to their own judgment upon the facts found by them. Full freedom of final action must necessarily remain unaffected. Cooperation merely affords opportunity for more complete understanding of all relevant facts, and opens the way for the avoidance or removal of

discriminations through the reaching of common understandings.

Offer of State Commissions to Cooperate.

It is not improbable that the invitation to State Commissioners to sit in Ex Parte 74 was extended by the Federal Commission by reason of the action of the National Association, which was referred to in a brief filed by the Association in proceedings before the Federal Commission in the New York passenger fare case, as follows:

> "Before the President's signature was affixed to the Transportation Act of 1920 the officials of the National Association of Railway and Utilities Commissioners conferred with the Chairman of this Commission, and assured him of the desire of the State Commissions generally to cooperate with this Commission with the genuine purpose of securing harmony of action within their respective spheres."

Resolution of National Association Accepting Invitation of Federal Commission.

While the State Commissioners assumed the burden of labor involved in accepting the invitation extended by the Federal Commission, they did not understand that their effort to effect the full purpose of the law would be held to prejudice their freedom of action officially. The invitation was accepted in a resolution of the National Association communicated to the Federal Commission as follows:

> "WHEREAS, the Interstate Commerce Commission has extended to this Association an invita-

tion to cooperate with that Commission in the matter of applications pending before it for increases in carrier rates in the three classification territories by the appointment of three representatives of the Association, members of State Commissions having regulatory jurisdiction over intrastate rates of carriers, to sit with the Interstate Commerce Commission upon the hearing of such applications, and to consider with the members of that Commission what increases ought justly to be made, with the clear understanding that such participation or cooperation shall not prejudice the right and powers of the Interstate Commerce Commission as to interstate commerce under Federal laws, or the rights and powers of the several State Commissions as to intrastate commerce under the laws of their respective states; therefore be it

"RESOLVED, that this Association accepts such invitation, and that three such representatives of this Association be selected, in such manner as the Association may by vote determine, to sit with the Interstate Commerce Commission upon the hearing and consideration of said applications upon the understanding expressed in such invitation."

Statement for National Association at Hearing in Ex Parte 74 Concerning Participation Therein.

While the hearing in Ex Parte 74 was proceeding, the following statement was made by counsel for the National Association of Railway and Utilities Commissioners, at page 2275 of the record:

"Now in view of the colloquy which took place the other day between Mr. Campbell and Judge Thom, I desire, while I am speaking, to say something on the record about the relation of this record to state com-

mission proceedings, and especially about the action of the National Association in causing the same to be distributed. It is desirable that there shall be no possibility of misapprehension as to that.

The record has been distributed at the instance of the National Association of Railway and Utilities Commissioners at the expense of the carriers who are presenting their case here. Arrangements came to be made in the following manner.

At the meeting of state commissioners held in Chicago to consider the invitation for cooperation extended by this Commission, a committee was appointed to make arrangements for the convenience of the state commissioners in connection with the hearing here. It was desired that the suggestion should be made to your Commission that the record be printed in daily installments and distributed to all the State Commissions. It developed that under the terms of your contract with the official reporters this could not be done. The committee thereupon suggested to counsel for the carriers that they cause the record to be distributed from day to day during the progress of the hearing, so that the State Commissions might be enabled to follow the hearing. This they readily agreed to do.

The use which could be made of this record in state proceedings was discussed. Counsel for the carriers were advised that the National Association could make no attempt to say what any State Commission would do with respect to accepting the record made here; that obviously each commission must determine that matter for itself, in view of its own law, and its own judgment as to what its course ought to be, but

that the view of those commissioners who had expressed themselves at Chicago had been to the effect that, so far as their own commissions were concerned, hearings might be expedited by introducing the record as made here, without calling again the witnesses placed upon the stand here. Such record would, of course, be supplemented by evidence desired to be offered as to the state case either by carriers or by others. It was well understood that no attempt was made to state that this course of procedure would be in accordance with the law and acceptable to the commission in every State.

At the meeting of State Commissioners held in Washington on May 22, to reach a final determination concerning the invitation which this Commission had extended, the matter of the use of the record to be made at this hearing was further considered. A resolution was offered recommending to the State Commissions that, in the rate proceedings growing out of the advances now asked in the several States, the record made here be received as a part of the record in the State proceedings. Upon a vote only four Commissioners voted against the resolution. The opposition of those Commissioners, so far as expressed, was based not upon a disinclination so far as their own commissions were concerned to admit the record if offered, but instead upon the opposition of those commissioners to the principle of recommending to any Commission what its ruling should be upon evidence to be offered before it. The entire propriety of that view impressed the meeting, and upon motion the vote was reconsidered, and the resolution withdrawn, so that when the matter of receiving this record comes up before any Commission, that Com-

mission may be certain that the National Association has not in any way encroached upon its prerogatives, even so far as to recommend what shall be done with respect to the use of this record. That is a questi which must be decided by each Commission upon its view of the law which governs it, and its view of what its own action ought to be.

Upon one matter I am sure I can speak without reservation for all of the Commissions which act through the National Association. It is their wish to cooperate with this Commission to the fullest extent possible. In any matter concerning which in the exercise of their respective powers the Federal and State Commissions have jurisdiction, the facilities and the assistance of the State Commissions are yours upon request. They desire to help in giving the fullest effect to the cooperative provisions of the Transportation Act, which provisions represent a constructive legislative attempt to facilitate harmonious action in the exercise of State and Federal powers of regulation.

The State Commissions recognize that harmony can not be attained by disregard on the side either of Federal or State power of the rights and duties of the other side. When common action is necessary, it is not likely to come through one side determining what the action ought to be and then inviting the other to cooperate by taking that action. In such cases harmony can only be insured by frank cooperative action from the beginning, and by comparison of views, and by a genuine attempt to reach together a common judgment. Accordingly the State Commissions welcome the action which your Commission has taken in this proceeding, because it indicates a recognition of that fact upon your part. It is hoped that as time goes on the State

and Federal Commissions may come to work easily together, so that in conformity with the spirit of our dual plan of government the people in local matters may continue to enjoy the benefits of local regulation, and so far as the interests of the several States are affected the people of the nation may enjoy the regulation of this tribunal, the State and Federal authorities complementing each other and operating without conflict.

In the domain of politics our plan of government has worked well, not because it was so designed as to offer no opportunity for conflict between State and Federal powers, but because generally our people have had such capacity for government as to avoid conflict. They have bent their efforts towards showing not that the Federal plan must work badly, but that it could work well. There has been no disposition on the part of the Federal Government to override the powers of the States, nor on the part of the States to disregard the Federal authority. There has been instead a disposition to expect respect of rights and to extend respect of rights, to accommodate views, and to deal with important questions arising in a broad constructive, American way, and to "carry on," doing in each case what ought to be done to meet the situation.

There is easy opportunity for constant conflict and litigation and ill feeling to arise from clashes between State and Federal powers of regulation, but I believe the men who are on the regulating Commissions, both State and Federal, are approaching the question of avoiding these clashes in a spirit which promises success. Success will not be easy, but achieving it is a part of the problem of making our dual form of government work well. The State Commissions view

the actions of this Commission in this proceeding as a step in the right direction, and in what they have done they have sought to indicate their desire to cooperate with you."

The Report of State Commissioners in Ex Parte 74.

Because Mr. Scott has been misled by a reference to the report of the Commissioners who sat in Ex Parte 74, which he reproduces in his brief, we think it proper to present herewith in full the paragraphs of that report in which their approval of the action of the Federal Commission as to interstate rates was expressed, and in which they made certain recommendations as to intrastate rates, as follows:

> "The Commissioners were not of one mind on all questions and their conclusion in many cases was the result of recognizing that the views of the other man must be taken into account and that there must be some surrender by each before an agreement could be reached. In some instances the conclusion of the majority is the view expressed in the ruling. On some of the questions our views were not in full accord with the majority and in some instances we three State Commissioners did not have unity of view. However, when all matters are considered, and remembering that where thirteen men are considering controverted questions and proposed policies, their differences of opinion must be composed or decided by the majority, we believe that the conclusion, considering all things, is just and fair and we give it our approval.
>
> "The increased rates permitted under the ruling in Ex Parte 74 will probably go into effect September 1, 1920. The reasons requiring an increase of interstate rates are very persuasive of

> the need for increase in intrastate rates. The operating revenues of the railroads under present rates and conditions are recognized by all persons as insufficient. A part of the responsibility to meet the situation rests upon the State Commissions. Such increases as will be made in intrastate rates should, if possible, be made effective September 1, 1920."

It will be noted that it is not a fact, as Mr. Scott was led to believe, that the three State Commissioners who sat with the Federal Commission recommended similar increases in intrastate rates. Ex Parte 74 related to interstate rates only. The applications for intrastate increases were not before the Federal Commission, in that proceeding, and it would have been clearly improper for the three State Commissioners who sat to recommend what action should be taken in cases which they had not heard nor been informed about. It was proper for them to suggest that such increases as might be allowed in intrastate rates should be made effective, if possible, at the same time as interstate increases.

The Invitation by the Federal Commission to State Commissioners to sit in Ex Parte 74 Was Not a Compliance with the Law in This Case.

We think the only purpose of the reference made by counsel on the other side to the participation of State Commissioners in Ex Parte 74 must be to support the claim that thereby the Federal Commission complied with the requirements of section 13 (3) as to this case. Concerning that claim, we say that Ex Parte 74 was not this case, which involves Wisconsin rates. The nature of the order of investigation, made by the Com-

mission in this case, was such that it appeared that the rate-making authority of the State of Wisconsin might be affected by the result of the proceedings. Under the act, as we construe it, the Federal Commission should have asked the cooperation of the Wisconsin Commission. Had that been done, such recommendations might have been made, by the Wisconsin Commission to the legislature of that state, that before now such changes, if any, as appeared desirable, as a result of the joint proceedings, would have taken effect, and this litigation thereby would have been rendered unnecessary.

Conclusion.

We believe the action of the Federal Commission and of the National Association of Railway and Utilities Commissioners in Ex Parte 74 was a step in the right direction, and that to the cooperation which resulted may in large part be attributed the celerity with which hearings were held and concluded, which finally led, in the brief space of two months' time, to the orders of State Commissions which have been digested and shown on the tabulation at page 161 of our principal brief.

We point out, however, that Ex Parte 74 was not the character of rate case that the provisions of section 13 (3) were designed especially to provide for. Those were cases directly involving intrastate rates claimed to be discriminatory against interstate commerce.

Whether a difference in rate levels is "undue, unreasonable or unjust" depends upon the effect which changing it would have upon state commerce, as well as upon interstate commerce. If a great injury would be done to state commerce by the change, and only a

slight benefit would be obtained by interstate commerce, the discrimination may not be unlawful.

We think the intent of the cooperative provisions was to safeguard intrastate commerce, and the rights of the states, from orders of the Federal Commission made without full knowledge of state situations. It provides a way whereby the Federal Commission may have the aid of the cooperative effort and helpful suggestions of State Commissions during the hearing, made not in any contentious way, as parties to the proceeding, but subject to the sense of official responsibility which would exist in a joint conference or joint hearing, such as is contemplated by the statute.

As we understand the rule, whether "may" or other permissible words shall be construed as equivalent to "shall" depends upon the probable intent of the legislature, and if it is necessary to construe the same as mandatory to prevent the purpose of the act from being defeated, such construction will be adopted.

When public interests and rights are concerned, it will not be supposed that Congress intended to leave those interests to be served or not according to the fancy of the Commission, but rather that the power was conferred with the intent that it should be exercised.

If it is pointed out that in the first sentence of section 13 (3) the word "shall" is used, whereas in the second sentence, now under discussion, the word "may" is used, and this is claimed to indicate an intent to give discretion to the Commission, we would point out that "may" was necessarily used, for the reason that cooperation would depend upon the disposition of the state regulatory authorities to avail themselves of the opportunity to cooperate. Congress

refrained from using the word "shall" because of the fact that cooperation might prove to be impossible, but in using the word "may," followed by the words "and to that end is authorized and empowered * * * to hold joint hearings," Congress granted a power, not for the benefit of the Commission, but for the benefit of the people of United States, and especially for the benefit of states whoses rates might be brought in question by proceedings before the Federal Commission.

We urge that this is a case which particularly calls for the application of the rule to which we have called attention. This plan of cooperation between State and Federal Commissions was designed to coordinate the activities of the State and Federal Commissions, and to make it possible for them severally to exercise the powers that properly belong to them, and yet without conflict.

In no one of the 16 state cases so far decided under the Transportation Act has the Federal Commission seen fit to use the power that was given it to avail itself of the proferred cooperation of the State Commissions in the states affected. We have no wish to question the rightness of the motives of the Federal Commission, but we do feel compelled to point out that the purpose of the act is defeated when the Commission thus refuses to avail itself of the power granted to it.

If it be said that the proceedings are in the nature of a review of the action of state authorities, and that it would be anomalous to have a subordinate board sitting with the reviewing board upon such a review, there are two answers in this case.

The first is that, if the proceedings are in the nature of a review, Congress knew it, and made the cooperation of the subordinate board lawful by section 13 (3).

The second is that in this case, as in most of the cases so far decided, the rates in question, so far as the states were concerned, were statutory, and the State Commissions had no jurisdiction over them. Accordingly, in this case such suggestion would not apply.

We believe that nothing could be done which would go so far towards putting an end to Shreveport litigation in the courts as a decision in this case that this power of cooperation, vested in the Commission by Congress, is not to be exercised according to the inclination of the Federal Commission, but whenever a case arises in which is called in question intrastate rates which are claimed to discriminate against interstate commerce.

Respectfully submitted,

For the Railroad and Utilities Commissions of Forty-two States,

JOHN E. BENTON,

General Solicitor, National Association of Railway and Utilities Commissioners, 724 Eighteenth Street, N.W., Washington, D. C.

For the Board of Railroad Commissioners of North Dakota,

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MAR 11 1921
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WISCONSIN PASSENGER FARE CASE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

No. [redacted]206

RAILROAD COMMISSION OF WISCONSIN, ET AL., APPELLANTS,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

MEMORANDUM PRESENTING DECISIONS OF NINETEEN JUDGES OF THE UNITED STATES CIRCUIT AND DISTRICT COURTS SUSTAINING ORDERS OF INTERSTATE COMMERCE COMMISSION IN WISCONSIN PASSENGER FARE CASE AND SIMILAR CASES.

BRUCE SCOTT,
KENNETH F. BURGESS,
Solicitors for Appellee.

ALFRED P. THOM,
R. V. FLETCHER,
O. W. DYNES,
A. A. MCLAUGHLIN,
Of Counsel.

Washington, D. C., March 9, 1921.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1920

No. 691

RAILROAD COMMISSION OF WISCONSIN, ET AL., APPELLANTS,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

MEMORANDUM.

In this memorandum we have printed, for the convenience of the Court, the opinions of the lower Federal courts recently rendered upholding the validity of orders of the Interstate Commerce Commission prescribing intrastate rates in proceedings conducted under Section 13 of the Interstate Commerce Act.

At pages 48 and 49 of our original brief we referred to the various decisions of the Commission in accord with the Wisconsin Case, wherein intrastate rates in some of the other states were pre-

scribed to remove preference, prejudice and discrimination.

In practically every case the question of the validity of these orders has been passed upon by the Federal courts, either in granting injunctions to the carriers against interference in complying with the orders, or in dismissing the bills of complaint of state officers challenging their validity.

In each case where an interlocutory injunction has been granted, a special court of three Federal judges, constituted under Section 266 of the Judicial Code, has determined the issues. Where the proceeding has been in the nature of a direct attack on the validity of the order under the provisions of the Urgent Deficiency Appropriation Act, October 22, 1913, 38 Stat. L. Ch. 32, p. 219, the decision has likewise been made by three judges.

In none of these cases of court review, has a single Federal judge dissented from the decision of the Court upholding the validity of the orders of the Interstate Commerce Commission.

Thus far nineteen Federal judges have unanimously upheld the validity of orders of the Interstate Commerce Commission in the Wisconsin and similar cases after formal hearings, either on motions for interlocutory injunctions or on final hearing on bills of complaint directly attacking such orders. These judges are: Circuit Judges Baker, Manton, Denison, Sanborn, Page, Alschuler and Donahue, and District Judges Munger, Wade, Geiger, Carpenter, Ray, Hazel, Trieber, Sessions, Faris, Westenhaver, Anderson and Sater.

In Ohio, New York, Nebraska, Indiana, Michigan and Wisconsin, the decision was accompanied by an oral or written opinion of the Court. These opinions are as yet unreported, and we therefore print as an appendix to this memorandum the opinions of the special courts in these cases rendered by Circuit Judge Denison sustaining the orders in the Ohio case, 60 I. C. C. 78; and in the Michigan case, 60 I. C. C. 215; by Circuit Judge Manton sustaining the order in the New York case, 59 I. C. C. 290; by Circuit Judge Sanborn sustaining the order in the Nebraska case, 60 I. C. C. 305; by Circuit Judge Baker sustaining the orders in the Indiana case, 60 I. C. C. 337, and in the Wisconsin Case, 59 I. C. C. 391.

In addition to these cases, a special Court consisting of Circuit Judge Sanborn and District Judges Faris and Trieber, sitting at St. Louis, Missouri, on December 28, 1920, issued an interlocutory injunction without opinion against interference with the order in the Arkansas case, 59 I. C. C. 171. On January 29, 1921, the same Court issued an interlocutory injunction in the Minnesota case, 59 I. C. C. 502, the oral opinion of the Court not being preserved.

On February 14, 1921, a special Court consisting of Circuit Judges Baker and Page and District Judge Carpenter, sitting at Chicago, Illinois, on final hearing dismissed the bills filed by the Attorney General of Illinois attacking the validity of the Commission's orders in the Illinois cases, 59 I. C. C. 350; 60 I. C. C. 92,

and issued interlocutory injunctions to prevent interference on the carriers' bills of complaint. In this case and in the New York case the decisions of the court were made after full consideration of all the evidence before the Commission, direct attacks on the orders of the Commission having been made. Both court decisions were rendered after full consideration on final hearing.

In addition to this, District Judge Rufus E. Foster on March 5, 1921, issued a temporary restraining order in the Louisiana case, 60 I. C. C. 467, pending the assembling of a special court of three judges. The Iowa case, 60 I. C. C. 55, is protected by a similar restraining order of Circuit Judge Sanborn, the assembling of the special court being delayed by consent of the parties. In the Montana case, 60 I. C. C. 61, a restraining order was issued by District Judge Bourquin; and in the Texas case, 60 I. C. C. 421, by District Judge West.

The opinions of these various Courts sitting in all sections of the country and unanimously reaching the same conclusion, are of the greatest significance.

Respectfully submitted,

BRUCE SCOTT,
KENNETH F. BURGESS,
Solicitors for Appellee.

ALFRED P. THOM,
R. V. FLETCHER,
O. W. DYNES,
A. A. MCLAUGHLIN,
Of Counsel.

Washington, D. C., March 9, 1921.

APPENDIX

(OHIO CASE)

In the District Court of the United States for the Southern District of Ohio Eastern Division.

THE CINCINNATI NORTHERN RAILROAD COMPANY,

ET AL.,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,

ET AL.

Equity No. 163.

Before Denison and Donahue, Circuit Judges, and Sater, District Judge.

Hearing under Section 266 of the Judicial Code, of application for injunction to prevent interference by state officers with the action of the railroads in complying with Interstate Commerce Commission order No. 11830 directing that the intrastate passenger rate in Ohio be made 3.6 cents per mile, etc.

DENISON, Circuit Judge:

The Interstate Commerce Act of February 28, 1920, gives the Interstate Commerce Commission express power to make an investigation as to whether strictly intrastate rates do in fact constitute an undue discrimination against interstate commerce, and further provides that if the Commission holds such an investigation and finds that such discrimination does exist, the Interstate Commerce Commission shall thereupon prescribe and fix the proper rate for this intrastate traffic. It then further says:

> "Such rates * * * shall be observed while in effect, by the carriers * * * the law of any state or the decision or order of any state authority to the contrary notwithstanding."

Unless this quoted provision is invalid as applied to the situation which has arisen in Ohio, it is our plain duty to grant the injunction now asked for against the state officials.

In view of the concensus of opinion up to this time among the many similar courts passing upon the questions here involved and the probable speedy determination of them by the Supreme Court, we content ourselves with a summary of our conclusions, with only brief comment as to some of them. They are as follows:

1. The federal power to regulate commerce between the states extends to the changing of intrastate rates, whenever the latter do in truth constitute a substantial burden upon interstate commerce.

2. Undue discrimination is such a burden; and the power to determine the fact of its existence has been lawfully delegated to the Interstate Commerce Commission.

3. Conclusions of fact by the Interstate Commerce Commission are not subject to review by this court in this cause.

4. The entire intrastate rate structure has many unitary characteristics, and, from some aspects, is a unit. We cannot, as a matter of law, deny the possibility that the whole structure does, and that each and every part does, constitute a substantial burden upon the comparable interstate commerce. The Commission has found this is true; its order is supported by its finding; and that finding is within the limits of its lawful authority.

5. If it should be assumed that there are some intrastate rates which have no such relation to interstate commerce that they can be a burden thereon, and that specific errors therefore exist in the operation of the blanket order, yet it is not necessarily wrong to treat them, as the Interstate Commerce Commission has done, as so far exceptions to the general rule that they may rightly be left to subsequent

specific action for remedy, while the general rule is to be enforced until the exceptions appear.

6. The milk and cream rates present the severest test of the rightfulness of a blanket order. Discrimination against interstate commerce from localities just outside the state border to cities just within is probable enough, but the existence of any substantial interstate commerce in these articles to or from, say, Columbus, we should suppose unlikely; but we cannot oppose our suppositions to the commission's findings. If its conclusion is sufficiently erroneous, those injured have remedy under section 208 of the Judicial Code, as revised and amended by 38 Statutes, 219.

7. It has now, for the first time, become the duty of the Interstate Commerce Commission to fix interstate rates so that the railroads will receive a specified net rate from their entire business. An injury to a part injures the whole. It seems obvious that if a rate of 3.6 cents upon all the traffic is necessary in order to earn the prescribed net return, action by the state compelling a less rate on intrastate business will in turn compel the imposition of a larger rate upon the interstate business, and seems highly probable that each railroad does so much interstate business that it suffers from this burden. The provision of the Transportation Act fixing this net rate as the basis of interstate rate making, rather than the inherent reasonableness of the interstate rates themselves, and several other provisions of the act, make the situation materially different from that existing when it was held that the forbidden discrimination did not result merely from the existence of state rates so low that the sum of the locals was less than the through rate. The new situation created by these amendments furnishes additional support for the Commission's finding in No. 11,830, and also tends to indicate that its power is not now limited to removing specific discriminations.

8. Section 2 must be construed in connection with section 13; and, together, they amount to saying that the act does not extend to intrastate rates, *unless* the Commission finds the fact to be that they constitute undue discrimina-

tion against interstate commerce, and that, in this event, the act does extend to them. Incidents of the progress of the bill through Congress cannot modify the plain meaning of the language finally chosen.

9. Where a state rate law has been temporarily enjoined because it was probable that the railroads might ultimately be able to establish a disputed fact (its confiscatory character) satisfactory security has frequently been required for the ultimate repayment to the passengers of the disputed excess rate. The principle does not apply here. In substance, the state is alleging the unconstitutionality of the federal law, and there can be no such presumption that Congress or the Interstate Commerce Commission has exceeded its power as to require the giving of security, by those who are obeying the law, while its validity is being tested.

10. Of course, review proceedings should be expedited, and an appeal may be allowed in open court, thus avoiding delay through service of citation, and the clerk may make and file a return to the appeal immediately; and it will be understood as a condition of the temporary injunction that counsel for the railroads join with counsel for the state in all reasonable efforts to expedite a hearing in the Supreme Court.

March 3, 1921.

(NEW YORK CASE)

United States District Court, Northern District of New York.

RAILROAD COMPANIES, PLAINTIFFS,

against

PUBLIC SERVICE COMMISSION, Second District of the State of New York, and Charles B. Hill, Frank Irvine, John A. Barhite, Joseph A. Kellogg and George R. Van Namee, as members of and constituting the Public Service Commission, Second District of the State of New York, and Ledyard P. Hale, individually, and as counsel to said Public Service Commission, Second District of the State of New York, Defendants.

THE STATE OF NEW YORK and Charles D. Newton, Personally and as Attorney General of the State of New York, *Plaintiffs*,

vs.

THE UNITED STATES AND EDGAR E. CLARK, Charles C. McChord, Balthaser H. Meyer, Henry C. Hall, Winthrop M. Daniels, Clyde B. Atchison, Robert E. Woolley, Joseph B. Eastman, Henry J. Ford and Mark W. Potter, constituting the Interstate Commerce Commission, *Defendants*.

Before MARTIN T. MANTON, Circuit Judge, and GEORGE W. RAY and JOHN R. HAZEL, District Judges.

Holding the Court pursuant to Sec. 266 of the Judicial Code.

These several actions instituted by the railroad companies, are for an injunction seeking to restrain the Public Service

Commission of the Second District of the State of New York, the Attorney General of the State of New York, and counsel for the Public Service Commission for the Second District, from commencing any suit or proceeding to enforce the provisions of the laws of the State of New York (Chap. 48, 49, of the Consolidated Laws of 1910; Sec. 57 of the Railroad Law; Secs. 24, 56, 57 of the Public Service Commission Laws) against said plaintiffs by reason of anything done or omitted to be done by the plaintiffs under the authority of an order of the Interstate Commerce Commission, or doing any act which would prevent or tend to prevent the plaintiffs or their agents from charging or collecting the intrastate rates, fares and charges established by the Interstate Commerce Commission in the State of New York. They seek an injunction pending the hearing and determination of the plaintiff's application for an interlocutory injunction.

The State of New York and the Attorney General of the state seek an injunction restraining the Interstate Commerce Commission from enforcing an order made fixing said rates and charges and seek to have it determined that the order of the Interstate Commerce Commission is wholly null and void and unconstitutional and illegal, and ask for "writs of mandamus, certiorari and prohibition as warranted by the principles and usages of law." They seek to restrain the defendants, and their agents, from bringing any suit, action or prosecution against the railroads to compel the enforcement, operation and execution of the findings and orders of the Interstate Commerce Commission referred to, and finally, they seek injunctive relief. Each of these applications opposed.

MANTON, Circuit Judge.

The question presented in these cases is whether the Transportation Act of 1920, Sec. 13, in so far as it permits the Interstate Commerce Commission to fix the rates and fares for the intrastate traffic on interstate railroads in the State of New York, is constitutional. The act provides:

"Sec. 13 (3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any state, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the state or states interested to be notified of the proceeding. The Commission may confer with the authorities of any state having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such state bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such state regulating bodies on any matters wherein the Commission is empowered to act and where the ratemaking authority of a state is or may be affected by the action taken by itself of the cooperation, services, records, and facilities of such state authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers

parties to such proceeding affected thereby, the law of any state or the decision or order of any state authority to the contrary notwithstanding."

The Interstate Commerce Commission, pursuant to the provisions of this Act, was requested in a proper proceeding, to make findings as to an increase in freight rates and passenger fares and baggage charges, and rates for milk and cream within the region which includes the State of New York. It made findings for this region allowing an increase of 40 per cent in the interstate freight rates, 20 per cent in interstate passenger fares, baggage charges, and rates on milk and cream, and also a surcharge amounting to 50 per cent of the charge for space in the sleeping and parlor cars to accrue to the rail carriers (*Ex Parte* 74 Increased Rates 1920, 58 I. C. C. R. 220.) Thereafter, the steam railroads within the State of New York made, pursuant to Sec. 13, an application to the Public Service Commission of the State of New York, Second District, for permission to file, effective on five days notice, tariff supplements providing increase in rates, fares and charges applicable to the intrastate tariff in the State of New York, corresponding with those authorized by the Interstate Commerce Commission. The Public Service Commission allowed the same so far as the rates and charges for transportation of freight, except milk (Order of August 19, 1920), and the increase became effective August 26, 1920, contemporaneously with the increase in the interstate rates. However, so far as it related to passenger fares, sleeping car and parlor car fares, baggage charges and rates on milk and cream, the application was denied by the Public Service Commission. A petition for relief was thereafter filed by the steam railroads under the provisions of Sec. 13 of the Interstate Commerce Act with the Interstate Commerce Commission. Upon the hearing of this petition, the Interstate Commerce Commission found that the refusal of the State of New York through the Public Service Commission to permit the carriers to increase the rates and fares here in controversy to the extent approved by the Inter-

state Commerce Commission is costing the railroads between eleven and twelve million dollars annually, so that the annual earnings of the interstate carriers operating in New York are now between eleven and twelve million less than they would be if the general lawful rates and freights approved by the Interstate Commerce Commission had become effective on intrastate traffic. Specifically, they find as to passenger fares, they are of an unduly preferential character and so far as the intrastate fares and charges now in effect in the State of New York are concerned, interstate passenger fares are in general upon a basis of 3.6 cents per mile per maximum. Passengers traveling between points in the State of New York and other states, may be required to pay 3.6 cents per mile, whereas passengers traveling within the State of New York pay only 3 cents per mile. The basis of 3.6 cents applies on intrastate traffic in every state bordering on the State of New York, and intrastate passengers in New York enjoy a basis of fare distinctly lower than those exacted from interstate passengers in the same territory, often riding in the same trains, and also lower than fares paid by intrastate passengers in neighboring states. It is found that there are no transportation conditions in the State of New York that justify lower rates or fares on the whole than those applicable in neighboring states or lower than the interstate rates and fares between points in New York and points in other states. As illustrative of this, the Commission cites the case of the several available routes connecting New York City and Buffalo over the New York Central, while the others are interstate. It is pointed out that on August 26, 1920, the fare was $14.26 over the interstate routes and $13.60 over the New York Central, a difference of $1.11 in favor of the passenger using the latter route. And in case the passenger occupies the lower Pullman berth, the difference is $2.36. A passenger traveling from New York City to a point west of Buffalo, can, by buying a ticket to Buffalo over the New York Central, and buying another ticket at Buffalo to destination, defeat the through interstate fare. This practice is found to be car-

ried on to considerable extent with a tendency to disrupt the entire fabric of interstate passenger fares in the territory involved. Excess baggage charges are governed by the passenger fares and a discrimination in passenger fares necessarily involves a discrimination in excess baggage charges. Likewise, in the rates fixed for milk and cream—which includes skim milk, buttermilk, condensed milk, evaporated milk and pot cheese—it is shown to be discriminatory. It is pointed out that the New York Central Railroad operates nine milk trains daily to New York City district, carrying one million three hundred thousand quarts of milk and cream, of which approximately 75 per cent is shipped over intrastate routes and approximately 25 per cent over interstate routes. Nine or ten carloads of milk and cream per day originates on the Ulster & Delaware Railroad, which extends from Kingston, N. Y., northwest to Oneonta, one hundred and seven miles. The cars are delivered to the New York Central at Kingston, together with six or seven cars originating on a branch of the latter carrier, extending southwesterly from Kingston, and are there formed into a milk train which moves to New York over the tracks of the West Shore Line. The route over the West Shore line extends into the State of New Jersey, the West Shore terminals being at Weehawken, and is therefore an interstate route. Shipments of milk and cream also originate at points on the east side of the Hudson and in territory not far distant from that served by the Ulster & Delaware, and move to New York over the intrastate route of the New York Central along the east bank of the Hudson River. On shipments using the interstate route, the rate charges are 20 per cent higher than those over the intrastate, although there is no justification, from a transportation point, for a difference in the rates. Further, it is pointed out that a milk train is operated by the Delaware & Hudson Company from Eagle Bridge, New York, which is northwest of Troy, in a northerly direction, a distance of fifty-two miles, to Castleton, Vermont, thence southwesterly to Troy, New York, where it is delivered to the New York Central. Between Eagle Bridge

and Castleton, this train crosses the state line three times, and again shortly after leaving Castleton for Troy. All shipments received before the last crossing of the state line are interstate shipments and others intrastate shipments. On milk and cream in this train, which crosses the state line, charges must be made at interstate rates, which are in excess of the charges for intrastate rates. The shipment of milk and cream on the western Vermont border are, when shipped to the New York City district, in competition with the milk and cream shipped from eastern New York State, which would have an intrastate route of carriage. The Interstate Commerce Commission has found that interstate rates on this traffic were unreasonable and unduly prejudicial to shippers from nearby points and unduly preferential of shippers from distant points, and resulted in a scale of mileage rates in blocks of ten miles each from distances away from the New York district up to six hundred and thirty miles. Thus uniformity was procured. (Milk and Cream Rates to New York City, 45 I. C. C. R. 112.) With this present difference of 26 per cent increase above intrastate rates, such uniformity of charge would no longer exist.

The question of commutation fares was presented to the Commission, but that was reserved for future consideration.

The foregoing findings of the Interstate Commerce Commission are binding upon us, if the findings have any evidence to support them. An examination of the testimony taken by the Commission upon the hearing of the petition for relief satisfies us that there is evidence to support the claims advanced by the railroads.

It was said in the Supreme Court, in *A. T. & Santa Fe Ry. Co. vs. United States* (234 U. S., 24), where the Supreme Court had under consideration the question of restraint of the Interstate Commerce Commission in executing an order which required carriers to desist from exacting a charge for delivering and receiving a carload of freight to and from industries located upon spur tracks and side tracks within their respective switching limits in Los Angeles, when moving in interstate commerce:

"But, laying the generalization on one side, it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined according to the actual conditions of operation.

Such a question is manifestly one upon which it is the province of the Commission to pass.

4. We must therefore take the findings of the Commission in the present case as to the character and manner of use of the industrial spurs in Los Angeles—that they constituted part of the carrier's terminals and that under the conditions there existing, the receipt and delivery of goods on these spurs was a like service as compared with the receipt and delivery of goods at team tracks and freight sheds—as conclusions of fact. Assuming that they were based upon evidence, they are not open to review (citing cases)."

And in *Skinner & Eddy Corp. vs. United States* (249 U. S., 557) it was said at page 562:

"*First.* The defendants contend that the District Court did not have jurisdiction of the subject-matter of this suit; because orders entered in a fourth section proceeding cannot be assailed in the courts; at least, not until after a remedy has been sought under Secs. 13 and 15 of the Act to Regulate Commerce. This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the Commission (citing cases); and the finding thereon would have been conclusive unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law (citing cases.) But plaintiff does not contend that 75 cents is an unreasonably high rate or that it is discriminatory or that there was

more error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission."

And in *Seaboard Air Line Ry. vs. United States* (U. S. Adv. Op. 1920-21, page 11) the Supreme Court said at page 16:

> "We are of opinion that the Commission was correct in regarding the service in question as a like and contemporary service rendered under substantially similar circumstances and conditions, and amply sustained as matter of law in *Wright vs. United States* 167, U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822, and *Interstate Commerce Commission vs. Alabama Midland R. Co.*, 168 U. S., 144, 42 L. ed., 414, 18 Sup. Ct. Rep. 45. The principle established in these cases is that the statute aims to establish equality of rights among shippers for carriage under substantially similar circumstances and conditions, and that the exigencies of competition do not justify discrimination against shippers for substantially like services.
>
> "Moreover, the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary, or transcends the legitimate bounds of their authority (citing cases.)"

After the findings were made by the Interstate Commerce Commission and the orders issued, it was binding upon the railroad companies and each was obligated to charge and collect the rates there fixed. Pursuant to S. 13 if, after hearing, the Commission should find that such intrastate rate of fare "causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intra-

state commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce," it shall then be the duty of the Commission to prescribe a rate or charge upon such intrastate commerce in order to remove such advantage, preference, prejudice or discrimination. Further than this, the rate having been fixed by reason of the terms of S. 13, such rates, fares, and charges must be observed by the carriers affected thereby, the law of any state or the decision or order of any state to the contrary notwithstanding.

The railroad complainants have alleged by their complaints and affidavits that, notwithstanding the order of the Interstate Commerce Commission made after such findings, the state authorities are attempting to prevent the complainants from complying therewith, and are threatening prosecution because of compliance therewith by the complainants, and that thus irreparable damage will be done to them if the state authorities are not restrained.

If Congress had the power to legislate granting the authority to fix such intrastate rates so as to prevent undue or unreasonable advantage prejudice or preference between persons and localities in intrastate commerce and interstate or foreign commerce on the other hand, thus avoiding undue and unjust discrimination, the facts found by the Commission warrant its order. That Congress had power to so legislate has been substantially decided by the Supreme Court. In the Minnesota Rate Case (230 U. S. 352) the Court said:

> "This reservation to the states manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects com-

mitted to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere (citing cases).

"The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation."

No local rule can nullify the lawful exercise of federal authority, and, after the Interstate Commerce Commission has made an order within its jurisdiction, there is no compulsion on the carrier to comply with any inconsistent local requirements (*Houston E. & W. Texas Ry. Co. vs. United States*, 234, U. S. 342.)

Where state and federal views conflict, the judgment of Congress and the agencies of the government lawfully established by the laws of Congress must control. Otherwise, "the nation could not prosper if interstate and foreign trade were governed by many masters." (*Houston E. & W. Texas Ry. Co. vs. United States, supra.*) In the Houston case,

where an order of the Interstate Commerce Commission was made to correct discrimination found to exist against specified localities, interstate carriers were ordered to desist from charging higher rates for transportation between certain specified interstate points than between certain specified intrastate points. It was held to be within the power delegated by the Congress to the Commission that, so far as the carrier's interstate rates conform to what was found to be reasonable by the Commission, they were entitled to maintain them, and that they were free to comply with the order by so adjusting their intrastate rates, to which the order related, so as to remove the forbidden discrimination.

It is urged by the State of New York that if the Interstate Commerce order be permitted to prevail so far as it affects intrastate rates, the same would violate the tenth amendment of the United States Constitution, in that it would invade powers reserved to the state to regulate intrastate commerce and to create, on proper conditions, control and regulate corporations doing business in the State of New York. And it is further contended that Art. I, Sec. 8, Clause 3 of the Constitution is violated by permitting the order fixing the rates to stand because it assumes to regulate purely intrastate commerce and requires that the revenue for interstate commerce be collected from intrastate commerce. These contentions are all disposed of by the language of the Supreme Court in *Gulf, Colorado & S. F. Ry. vs. Hefley* (158 U. S. 98) where Justice Brower writing the opinion announced:

> "Clearly the state and national acts relate to the same subject-matter and prescribe different rules. By the state act the bill of lading is made controlling as to the rate collectible, and a failure to comply with that requirement exposes the delinquent carrier to its penalties, while the national statute ignores the bill of lading and makes the published tariff rate binding, and subjects the offender, both carrier and agent, to severe penalties. The carrier cannot obey one statute without sometimes exposing itself to the

penalties prescribed by the other. Take the case before us; if, in disregard of the joint tariff established by the defendant and the St. Louis and San Francisco Railway Company and filed with the Interstate Commerce Commission, the latter company, as a matter of favoritism, has issued this bill of lading at a rate less than the tariff rate, both the defendant company and its agent would, by delivering the goods upon the receipt of only such reduced rate, subject themselves to the penalties of the national law, while, on the other hand, if the tariff rate was insisted upon, then the corporation would become liable for the damages named in the state act. In case of such a conflict the state law must yield. 'This Constitution, and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land.' Constitution, Art. VI, Clause 2. * * *

"Generally it may be said in respect to laws of this character that, though resting upon the police power of the state, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the states, is subordinate to those in terms conferred by the Constitution upon the nation. 'No urgency for its use can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.' *Henderson vs. New York*, 92 U. S., 259, 271. 'Definitions of the police power must, however, be taken, subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.' *New Orleans Gas Co. vs. Louisiana Light Co.*, 115 U. S. 650, 651. 'While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of federal authority as defined by the constitution, the latter must prevail.' *Morgan vs. Louisiana*, 118 U. S. 455, 464."

The facts found by the Commission and upon which it based its order, well illustrate the need for regulation of the intrastate rates by the Interstate Commerce Commission. Under the Transportation Act, it was thought to enable the carriers to earn an aggregate annual net railway operating income, equal, as nearly as may be, to 6 per cent upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. To accomplish this, the Commission is required to modify, establish, or adjust rates for the carriers as a whole or as a whole in each of such rate groups or territories as the Commission shall from time to time designate. The carriers here are included in the Eastern Group. To permit the New York State Law to prevail and the orders of the Public Service Commission of the State of New York to be enforced, would create an unjust discrimination of rates between the intrastate rate for New York and the interstate rate which, in turn, would cast a burden upon the interstate commerce of the railroads within this group; resulting in such a rise for maintenance of prices of rates and fares within the Eastern Group so as to make up the deficiency caused by the lower intrastate rates and fares, which the Commission finds is between eleven and twelve million dollars per year. This power was granted by the Congress to the Interstate Commerce Commission as a means of protection of commercial hostilities and reprisals between the various states. Therefore the protection of the Interstate Commerce Commission was imperative for the railroads. More so than ever, since the federal control of railroads, the country has learned the lesson of the importance of linking the arms of transportation and commerce over the country. It has resulted in the states becoming dependent upon each other to obtain favorable transportation conditions. Uniformity of rates to make for the proper transportation facilities where essential to the success of the purposes sought to be affected by the terms of the Transportation Act. We recognize that Congress has no constitutional power to touch intrastate rates

as such, and the Transportation Act of 1920 is intended only to protect interstate commerce. It is because the rate fixed by the Railroad Law and the Public Service Commission of New York casts a direct burden upon interstate commerce and is jeopardizing the power of the national carriers to maintain themselves on a basis which Congress declared they should be maintained under the Transportation Act of 1920, that this court grants relief.

Ample reason exists here why this court has jurisdiction and should prevent irreparable injury occurring to the railroads. Under Section 59 of the Railroad Law of the State of New York, complainants could be fined for charging more than that fixed by the Public Service Commission as a permissable fare or rate and Section 49 of the Public Service Commission law empowers the Public Service Commission of the Second district to fix the rate which the railroads are obliged to observe. For failing to carry out the orders of the Public Service Commission when fixed, as to rate or fare, each offense constitutes a separate violation for which there is a penalty of five thousand dollars, and the offending railway may be convicted of a misdemeanor for which there is the penalty of imprisonment to the offending officer and a fine of five hundred dollars. From all of this it is obvious that there is danger not only of injury and loss to the property of the railway companies because of their being subjected to the fines and penalties, but there is a threatened danger of multiplicity of suits.

The motion for injunctive relief of the several railroad company complainants will be granted, and the motion for injunctive relief of the Attorney General and the State of New York will be denied. The motion of the United States and the Interstate Commerce Commission to dismiss the bill for want of equity will be granted.

Orders may be presented accordingly; also final decree in the action instituted by the State of New York.

February 21, 1921.

(NEBRASKA CASE)

In the District Court of the United States for the District of Nebraska, Omaha Division.

RAILROAD COMPANIES, PLAINTIFFS,

vs.

NEBRASKA STATE RAILWAY COMMISSION ET AL., DEFENDANTS.

THE STATE OF NEBRASKA, *Plaintiff*,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, THE Chicago, Rock Island & Pacific Railway Company, Chicago & North Western Railway Company, Chicago, St. Paul, Minneapolis & Omaha Railway Company, Union Pacific Railroad Company, The St. Joseph & Grand Island Railway Company, and Missouri Pacific Railroad Corporation in Nebraska, *Defendants*.

*Memorandum Opinion.**

By the Court, SANBORN, Circuit Judge, and WADE and MUNGER, District Judges.

SANBORN, Circuit Judge, delivered the oral opinion.

GENTLEMEN: Upon consideration of this case we have discovered that we are agreed upon what ought to be done with it, and we think we had better announce the result and let you work out the orders and the bonds and so forth, after that, after we separate and go somewhere else, and you may send them to us.

Of course, the foundation of the decision which we render is stated in these three paragraphs:

*In this case, and in the Michigan case, *post*, the state authorities had sought injunctions against the carriers in the state courts.

Under the power to regulate commerce, granted to it by the constitution, the Congress has authority to deal directly or by a commission with controversies about rates which substantially affect interstate rates or commerce or the revenues derived therefrom. In the exercise of this power Congress has prohibited unjust discrimination against interstate commerce and has empowered the Interstate Commerce Commission to remove such discrimination. The Commission has exercised this power and has, in the exercise of it, adjudged that intrastate rates in Nebraska unjustly and unreasonably discriminate against interstate commerce and has ordered the railroad companies to remove this discrimination by bringing the intrastate rates to the level of the interstate rates.

The judgments and orders of the commission are those of a quasi judicial and administrative body. They are not reviewable by this court nor susceptible to collateral attack. They may be assailed only for lack of jurisdiction of the parties or the questions adjudged, or by proof that there was no substantial evidence to sustain them, or that they were secured by fraud or resulted from error of law.

The order of the Commission, which has been presented here, has not been attacked upon any of those grounds except that the Commission had no jurisdiction or power to make this order. We are of the opinion that it had ample jurisdiction and plenary authority, and that the order of the Commission should be obeyed.

Now, as to the matter of the orders of the State Commission, the question of whether or not the orders of the State Commissions should prevail in various cases has been considered by many of the Federal courts and some of the State courts. Members of the judiciary of the Eighth Circuit, very many of them, have participated in such decisions after careful consideration of the questions, and those who have gathered here today are of the same opinion with those who gathered to hear the applications in regard to the Minnesota and the Arkansas and the other rates which have been ruled on in this circuit, that those judges who gathered there were. We think that

under the circumstances of this case, and especially in view of the fact that the Supreme Court will probably determine the question which is before us in the course of at least two months, that matters ought to be held in the condition in Nebraska in which they have been held in the other states, and the railroad companies ought to put in the rates which they are ordered to put in by the Commission. We think it would be unfortunate to all parties if we should fail to make orders to that effect.

As to the passenger rates there seems to be no question except the general question of jurisdiction of the Interstate Commerce Commission, and to what should be done with those rates; and we pass to a consideration of the freight rates.

There would be no question as to what should be done with the freight rates were it not for the fact that the State of Nebraska has brought a suit against the railroad companies before any suit was commenced in the Federal court for a purpose which is best stated in paragraph 10 of the petition, and in the prayer. After stating what has been stated by counsel, and read in the discussion, the State says:

> "Notwithstanding the order of the Nebraska State Railway Commission is in all respects in full force and effect, the defendants have given public notice that they will not be bound by the same but will disregard the same and will immediately impose the increase upon intrastate traffic as specified in the null and void order of the Interstate Commerce Commission dated January, 1921, that they will disregard the findings and order of the Nebraska State Railway Commission and that they will immediately put into force and effect a schedule of freight rates on intrastate freight traffic thirty-five per cent higher than those in force in Nebraska on August 25, 1920, being ten per cent higher than the rates allowed by the Nebraska State Railway Commission."

And the prayer of the bill is:

> "* * * that the defendants, and each of them, their respective officers, agents, attorneys, servants and employees, and all persons acting by, through

or in conjunction with them, be perpetually enjoined and restrained from making or putting into effect any rates or schedule of rates that will increase the intrastate freight rates in Nebraska above the amount allowed by the Nebraska State Railway Commission in its order in Application No. 4299, or from putting into force and effect any classification rating or using any other means whereby the rates provided in said order of the Nebraska State Railway Commission may be raised without first securing the consent, by due course of law, of the said Nebraska State Railway Commission to such increase; that a temporary injunction may be granted for these purposes and for such other, further and different relief as may be just and equitable."

Counsel for the State have argued this case as though this was a bill for the purpose of putting in force and holding in force the intrastate rates. We do not so read the bill. The relief which is asked is to enjoin the railroad companies from complying with the order of the Interstate Commerce Commission; that is the gist of the bill, the purpose of it and the object of it. If this were a bill simply for the purpose of putting in force the Nebraska State rates the question of removal would be a more serious question, but as we understand the bill that is not the purpose of it. The bill states that the Nebraska State rates are in force; that they are lawful and legal, and it says that these railroads are going to put in force the Interstate Commerce Commission's order which raises the rates thirty-five per cent when the State rates have been raised twenty-five per cent, and its cause of action is that the Interstate Commission's order is void, and the relief they ask is to prevent its being enforced. We do not construe this as an action for the purpose of enforcing the State rates, but a suit for the purpose of enjoining the enforcement and application of the interstate rates. And when that is considered to be the cause of action the cases which have been cited to the effect that where it is not necessary to say anything about a defense that someone may have, jurisdiction cannot be maintained by simply mentioning it in the complaint or by setting it out—we do not understand that it was unnecessary

to state the facts which have been read here in order to make a cause of action and get the relief which the State asks. And we think that the Supreme Court of the State was correct in sending the case over to this court and that this court has jurisdiction of the case.

We might say more in regard to this matter, but that is enough to indicate what the result is. You may prepare your injunction and give bonds. We have suggested this result so far as bond is concerned: that one bond for all the railroad companies for $200,000.00, or separate bonds for that amount in the aggregate made by the railroads in proportion to their business, conditioned that in case the order for the injunction is reversed or modified the obligors will pay all damages resulting therefrom to the defendants, will refund to passengers who request it the amounts paid by them for fares in excess of three cents per mile with legal interest, and will refund to shippers who request it the amounts paid for freight rates in excess of the rates prescribed by the order of the State Commission with legal interest, such damages and refunds to be ascertained as the court shall direct. If it is thought by counsel for the State or others that those bonds shall become too small at any future time application may be made to the court regarding the matter. We apprehend that the question of the validity of these various injunctions which have been issued will be decided within two months and that parties will not be seriously troubled about the bonds after that. We may be mistaken about that.

Now, we are obliged to separate and each go to our own places, and you may prepare the orders and send them. Judge Wade will be at Council Bluffs, I understand, for some time. You see that the orders correspond with our ideas, and if you want to consult with me you can, but I don't think you will need to. The orders can be entered here in the court the same as if these three judges were present, and will take effect, and this injunction will take effect from today although it may not be possible to write out the injunction and the bond this afternoon.

Omaha, Nebraska, February 21, 1921.

(INDIANA CASE)

In the District Court of the United States for the District of Indiana.

In Equity.

VARIOUS RAILROAD COMPANIES, PLAINTIFFS,

vs.

PUBLIC SERVICE COMMISSION OF INDIANA ET AL., DEFENDANTS.

By the Court, BAKER and PAGE, Circuit Judges, and ANDERSON, District Judge.

Oral opinion of the Court by BAKER, Circuit Judge:

I think I can state in two or three sentences the reason why we are all of the view that an interlocutory injunction should issue.

Congress has no authority to legislate and the Interstate Commerce Commission under any Act of Congress should have no authority to touch in any way intrastate commerce as such. If Indiana had said to railroad corporations that have been organized under the law of Indiana: "You go out and get a right of way but you do it under authority of the sovereign right of the State of Indiana, and that alone. You stay on that ground and don't get off of it, you do business up and down on that line and don't do business with anyone else," manifestly there would have resulted intrastate commerce that Congress could never have touched by an act and under no act could the Interstate Commerce Commission reach it. But Indiana did not do that. We know historically that great systems like the Pennsylvania and the New York Central, between Chicago as the western terminus and New York as the eastern are made up of ten or fifteen

little pieces that were finally welded together into one of the national highways. Then Indiana passed legislation permitting the Indiana corporations to consolidate with similar corporations of Ohio, Pennsylvania and New York to the east and Illinois to the west. Indiana was thereby consenting to the creation of a continuous national highway between Chicago as a western terminus and New York as an eastern terminus. Now when that situation was created by virtue of the Commerce Clause of the Federal Constitution, the interstate commerce that was going over that national highway was just as fully and exclusively under national control as if this railroad, instead of being made up of ten or twelve pieces welded together, little pieces built under separate State charters and finally gotten together under authorized consolidated charters of the various states, was just as fully a national highway as if it had just had one charter from the national government, and then it would have been just as much beyond the power of the State to touch as a national bank is beyond the power of the State to touch.

Of course, for public utilities commissions of states a large and important function remains with relation to furnishing of water, light, street railroad transportation, interurban transportation as long as it is purely intrastate.

But when the Esch-Cummins bill was passed there were certain respects in which the rightful authority of the Interstate Commerce Commission was enlarged.

The railroads had been treated practically as national highways. Practically, they had become long, continuous national highways by the consent of the State. The Government had had some experience in the operation of these railroads. Now to maintain these railroads as national highways, Congress decided that it was necessary in turning them back to the private owners that those private owners should have a clear return upon the capital actually employed in the public service of five and one-half per cent, added under certain contingencies, six per cent. That was for the purpose of assuring the public as a whole that these owners would be

willing to have their property continue in the national service. It is a mistaken idea that any sovereign can compel any public service corporation to continue to render public service. Any public service corporation has a right to surrender its charter and quit, junk its property and divide up the proceeds of the sale. They cannot compel the owners of the property, then, when it is devoted to public service, to have that property consumed and given in the form of service to the public. Of course, that is a violation of the provision against taking a man's property without compensation. So, for the purpose of assuring all of the people that these national highways would be continued and that the men who had their money in would be content to have their money in instead of junking the roads and selling their rolling stock and property, they made that provision and that was for the purpose also of creating a situation where people who had money that was not already tied up in railroad property would be willing to have it, to come forward with that money in order that the railroads might be maintained and operated as the public necessity required. That could not be accomplished unless these railroads were assured of an income that would provide not only for all maintenance and operating costs, with the operating costs increased from what they had been by various arrangements with respect to wages and also the great advance in material cost, and therefore the Interstate Commerce Commission was given new power; new duties were cast upon it to determine what is the value of the property that is devoted to this public service, figure out a rate of charges for service that will maintain this public service, will uphold these national highways, and will provide this necessary return, necessary in order for the people with their money now in to continue it in and to invite the necessary new money in.

While Congress never has the power to touch intrastate commerce as such, could not touch such a railroad as I described some time ago and cannot touch the Indianapolis Water Company, for example, or the Indianapolis Gas Com-

pany; but when Indiana consents that the railroads which she has chartered shall consolidate with railroads chartered by sister states and thereby create national highways, if upon those national highways, along with interstate commerce, there is carried intrastate commerce, then the true construction of the Esch-Cummins law brings about this situation, that neither Indiana nor any other State, for the benefit of its own citizens, can make a gift to its own citizens in the way of transportation of persons or property at the expense of citizens of the other states. In other words, intrastate commerce can not be permitted to become a burden upon interstate commerce. Outside of any question of showing in the evidence before the Interstate Commerce Commission, we know as a matter of common knowledge that in the frequent stops, local stations, the loss of force in stopping, exertion of getting up the momentum, people getting in and out, time expended, service of the local ticket agents and baggagemen, with respect to this local traffic, that local traffic between points in the same State costs more to handle than interstate commerce costs. May Indiana or any other State, for the benefit of its own people, say that we are going to have this more expensive article at a less price than it has been found that the national article must bring in order to maintain the existence of these national highways, and we are to get it at the expense of the commerce and of the rest of the country? Not so, and that is the reason that the temporary injunction will be issued.

By Mr. Lush:

If it would be proper, I would like to ask a question to get the view point as it undoubtedly has developed in this various litigation in which your Honor has acted and that is this: To me, as I looked into these questions, it occurred to me probably that one could not successfully dispute the power of Congress to authorize the Interstate Commerce Commission to take charge of the subject matter under the conditions that your Honor has so clearly outlined——

Judge Baker (resuming):

I beg of you, do not give away a point that was very

strongly urged by the Attorney General of Illinois. You should save that question for later. You do not want to waive the question of the constitutionality of the Esch Cummins Act.

By Mr. LESH:

I am speaking only with reference to this hearing that it would be useless for us to try to dispute that point before the Court on these applications for temporary injunction or preliminary injunction, but here is a point that I would like your Honor's explanation of. It seemed to me that the express condition in the Interstate Commerce Act that reserves—it starts out very early in the enactment to say that it shall not apply to intrastate shipments from one point to another, and that there are other provisions that hedge about that except when there is a necessary collision between the State and Federal orders. I do not see any place where those provisions have been expressly repealed, and the act that gives most of these enlarged authorities that are being claimed by the Interstate Commerce Commission is amendatory of the original enactment and under those rules where it is all to be construed together as if they were all there at one and the same time, what is the process of reasoning by which these express reservations are neutralized.

Judge BAKER (resuming):

You are quite right in saying that in the original act and through the processes of re-enactments and amendments down in the present law there appears the general statement that this act shall not apply to intrastate commerce. The presence of those words in the statute is just as immaterial as their absence would be. If a man has in fact builded a bridge, it is immaterial whether he paints on it, "This is a bridge" or not. So, when the words appear in the act that this shall not be construed to apply to intrastate commerce, their presence adds nothing to the law because the law in that respect flows from the Constitution of the United States as compared with the constitutional powers of the State. The constitutional powers of the State reaches only to the regulation of intrastate

commerce. Having the power to regulate commerce, they have the power to protect it. If the protection of interstate commerce requires that it be safeguarded against burdens attempted to be put upon interstate commerce by any State with respect to handling intrastate commerce commingled with interstate commerce, the Esch-Cummins Law reaches the situation, not because interstate commerce is being touched nor because the Federal Government is undertaking to exercise power beyond its constitutional limits of touching intrastate commerce as such, but Congress, in regulating interstate commerce, is exercising a power that it has unquesioned authority to exercise, the protection of interstate commerce. Like in all of the criminal statutes protecting interstate shipments—no one questions the power of Congress to protect interstate commerce. The necessary protection of interstate commerce, which is of national highways, the protection of an interstate carrier, requires that a State be told to keep its hands off, to refrain from laying any burden upon interstate commerce. It is wholly immaterial in what respects the State is undertaking to lay that burden. The Government is just telling intrastate commerce to climb down off the back of interstate commerce and cease being a burden to it.

That very question has been fully considered in the argument on the purpose and scope and history of the Esch-Cummins Act and the debates, extracts from the Congressional Record, and Mr. Esch's explanation of the bill in the House and Senator Cummins' explanation of the bill in the Senate, have all been fully considered and the answer to the contention which you suggest is the matter which has already been answered, the one that I have just outlined. Of course, we are always ready to hear renewed and continued arguments that would aid in lifting us out of an erroneous position, but the best judgment that I have been able to reach on the question remains at this moment as it was a week ago, and on consultation with Judge Page, I understand that he fully agrees with the line of thought that has been suggested, and that Judge Anderson does also. If the plain point at which we

have fallen into error can be suggested by you, Mr. Lesh, we would be very glad to hear it.

By Mr. Lesh:

As a basis for the question that I propounded, of course, it was these rules, that where an act is amendatory of another, different rules of construction apply. Then you must take it all in its settings. I find here in the Court of Claims a decision made during the Civil War, where a question arose in very much the same way, whether certain officers had to merely audit war claims and report to Congress for its action, or whether they had the power to adjudicate them, and after the act had been determined that they only had the auditing powers, Congress enacted some amendatory legislation of the code that had the same provisions and apparently gave stronger powers. It was therefore claimed that those officers had power to adjudicate those claims and that it was no longer for Congress to pass upon them. In settling that, the court approached those questions under the rules that an amendatory act is quite different from an original act and that these other limitations of their jurisdiction being expressed, that from any doubtful provisions that come in amendatory or additional sections which were amendatory enactments, that they would not confer that jurisdiction—that the doubts would all be resolved against the exercise of that jurisdiction. So in that analogy it seemed to me here in the Cummins Act these express reservations, and I have it in mind that the very sections that contained them were re-enacted in the Act of June, 1920, that contained these provisions of creating the income or six per cent. It seemed to me that a fair construction of these rules would almost impel the courts to hold that where they are giving the Commerce Commission a power to make these carriers earn a certain income, that by implication all the way through they are dealing with the interstate phase of it and not assuming that the property which would be used and useful for merely intrastate transportation should be considered in that connection. There may be something in the

debates that would indicate the contrary, but then after all, when you approach the construction of enactments of this kind, the debaters are not always the thinkers in Congress and my understanding is that debates take a very inconsiderable part in influencing the courts in a proper construction of the enactment.

Judge BAKER (resuming):

Whether it is true that the Shreveport case really decides the question that has been presented in these cases, namely, whether the United States has power to protect the interstate commerce from having any burden cast upon it by intrastate commerce and for the purpose of seeing that no such burden is cast, therefore to that extent the nation has power to say what intrastate rates shall be on national highways where it is carried along on the same highways by the same instrumentalities with interstate commerce; whether that question has been sufficiently clearly defined and already decided so that there is nothing really remaining to decide in these cases, whether that is true or not, it clearly appears that Mr. Esch was of the opinion and that Senator Cummins and the others were of the opinion that such was the scope of the Shreveport decision and they intended to embody that decision as they understood it in this legislation, that the Commerce that they were carrying, commerce between states, which is interstate commerce, of course, has no regard for State laws and that therefore the Interstate Commerce Commission in performing this new function of determining what rates were necessary in order to have this return to these national carriers, were to act regardless of State laws; that it was immaterial whether a man got on at Indianapolis and traveled as far as LaFayette or whether he traveled as far as Chicago, that for that travel, if national instrumentalities were used, wherever he was going he was going regardless of State laws and wherever he was going, he should contribute whatever was necessary in order to maintain these national lines. While it is true that Congress may not touch intrastate commerce as such, it has power

to deal and deal exclusively with interstate commerce and the right to protect it, and in protecting it it has the power to protect it from a burden cast upon it regardless of name.

There may be in Indiana—I had a case some years ago—that involved absolutely intrastate commerce alone, a little railroad over in Southern Illinois seventy miles long, running from one county seat, through the intermediary county into another county seat, and it found it could not get along on the two-cent passenger fare which had been enacted in Illinois and it brought suit urging its right under the Federal Constitution, Fourteenth Amendment, to have the Illinois Railroad Commission restrained from holding it down to the two-cent passenger fare, purely intrastate, but it was appealing not to have its property eaten up by its fellow citizens of Illinois. Now, going to the question of Illinois, if it does not confiscate the property of this little concern, it has got the exclusive right to regulate it because it begins and ends and hence its tracks and rolling stock and every thing are wholly within Illinois. States could control that, that is if it develops in the business world that it rendered it possible that men could have been sent to legislatures that would have insisted on the policy, but as far as power is concerned, if Indiana had said, "We will not permit a railroad corporation to be organized except on the express limitation that it shall not acquire property except it keep on Indiana's soil, that it shall make no contracts for doing business jointly with railroads of any other State, and that it has to stay right in here," very well. Over such carrier, of course, the State would have exclusive jurisdiction. Indiana did not do that. No other State did. These states have consented to what in fact are national lines. Intrastate commerce is not interfered with at all as intrastate commerce. All the denial that is put upon a citizen of Indiana by the Interstate Commission is this: "You shall not be excused from having your just share of maintaining these national highways. You shall not be permitted to have a partial gift of carriers' personal property at the expense of the rest of the citizens."

By Mr. LESH:

Couldn't they dispute that in the State courts? The State cannot deny them a right to a fair return.

Judge BAKER (resuming):

This is not a question of confiscation at all. It is a question of whether there is a burden on interstate commerce. It is not a question of whether these intrastate rates are confiscatory, like in the case of that little railroad. It was there said that the two-cent rate was confiscatory. No such question is here. Grant that the rates fixed by Indiana for intrastate business on these national highways that flow and in connection with a flow of interstate commerce, are sufficient to produce some revenue and are therefore not confiscatory.

By Mr. LESH:

It has to produce a fair return on the investment.

Judge BAKER (resuming):

Well, a fair return. We know that it was not long ago that four and five per cent was considered a fair return on railroad stocks and not long ago four per cent was the common rate of interest on prime commercial paper, but the particular task was given by Congress to the Interstate Commerce Commission of getting this revenue, which may be higher than a compensatory revenue merely would be, and Congress was doing it professedly for a national purpose. It found the necessity of doing this thing to preserve these national highways, and so it comes to whether that purpose can be carried out by the Interstate Commerce Commission despite attempted interference of local authorities. Our judgment is that the Interstate Commerce Commission has been given such lawful authority and has been and should continue to carry out that power. The suggestions that you have made are along the same lines that have been considered heretofore, and if the ruling is erroneous, we are not now able to see it.

By Mr. LESH:

I am thankful to your Honor because, that point not having been touched on, I simply wished your Honor's views.

Indianapolis, Indiana, February 21, 1921.

(WISCONSIN CASE)

In the District Court of the United States, Eastern District of Wisconsin.

In Equity.

RAILROAD COMPANIES, PLAINTIFFS,

vs.

RAILROAD COMMISSION OF WISCONSIN ET AL., DEFENDANTS.

Oral opinion by BAKER, Circuit Judge; ALSCHULER, Circuit Judge, and GEIGER, District Judge, concurring.

In each of these cases a temporary injunction will be issued for the following reasons:

Taking in view the history of the Interstate Commerce legislation which has progressed step by step during a long course of years, and taking into consideration with that legislation the additional development of interpretation, and arriving at the recent transportation act, we conceive the relation between the Federal government and the State government with respect to carriers' rates to be as follows:

Congress has no constitutional power to touch an intrastate rate as such. The power of Congress is derived entirely from the provision in the constitution which gives to the Federal government the exclusive control of regulation of interstate and foreign commerce. So a state through its legislature and through its railroad commission is left perfectly free to deal as it sees fit subject only to the carriers' protection under the 14th amendment with the rates of a carrier whose line is wholly within the state. I recall such lines in some states, of steam railroads in competition to the numerous trolley lines that are so situated, state control would also extend

over any tracks that an interstate carrier might have if that track was used, not as a feeder of interstate commerce but purely as a means of conducting an intrastate business.

In this case we interpret the bills to mean that the plaintiffs are making complaint only with respect to trains which run upon tracks that cross state lines into Wisconsin, or trains carrying passengers from points outside of Wisconsin into or through Wisconsin. Now, what is the character of such trains? It is an instrumentality of interstate commerce. Its standing in that respect has been the basis on which Congress has legislated constantly with respect to safety appliance, with respect to liability of employees, and the character of such a train, standing purely as an instrumentality in interstate commerce, it is not at all affected by the fact that on such train along with the interstate passengers there may ride numerous intrastate passengers. With respect to such interstate track Congress has exclusive power. Having in mind all of the legislation we find that Congress has now arrived at the point where it has authorized the Interstate Commerce Commission not to deal with intrastate traffic as such, but to deal with it only as a matter with which the Federal government has control. In such cases Congress has authorized the Interstate Commerce Commission to touch upon and regulate those intrastate rates which apply to persons who availed themselves of those instrumentalities of interstate commerce and ride upon these interstate trains. In other words, the purpose of Congress is clearly apparent to us to protect interstate commerce as such from any burden that might be put upon it by the state, that is, directly through the legislature of the state or through the orders of a state railroad commission, which would cause a burden upon the interstate commerce and impair the revenues which the Interstate Commerce Commission are authorized to investigate and to find are necessary to induce the American people to furnish and maintain the capital necessary to construct and equip and maintain these national carriers and interstate highways. In addition to the sections which bear directly upon this sub-

ject of discriminations against interstate commerce, there are the financial provisions, and there is also the power given to the commission to prescribe the rate which it finds is necessary in order to maintain the revenues that are necessary for the lives of these national carriers. When you look to the financial consideration of the act it is self-evident that the purpose of Congress in authorizing the Interstate Commerce Commission to act, and the purpose of the commission, we find what is necessary to produce the indispensable revenue would be destroyed, if the state were permitted to allow intrastate passengers to ride upon interstate trains at a lesser compensation. We must assume that the calculations of the Interstate Commerce Commission have been based upon the cost of carrying the passengers, and if a rate is made on a basis of passenger per mile and the intrastate passengers paying a lesser rate, it is casting the direct burden upon interstate commerce and is jeopardizing the power of the national carriers to maintain themselves on the basis which Congress declared they are entitled to maintain. To the extent that passengers, who are in fact interstate passengers, alight from trains at the first stopping point within the border of Wisconsin, and from that point to their ultimate destination within the state, availing themselves of the lower state rate, it is a means afforded to the real interstate passenger, by virtue of the action of the state commission, to defeat the purpose and intent of Congress with respect to interstate traffic. As to the presumption of validity of the state legislation, or the action of the state commission, we cannot quite agree with counsel for the defendants in saying that there is such a presumption that the commission cannot act and that state legislation can only be overthrown by the action of a court and then if so done say that such legislation would be unconstitutional beyond any reasonable doubt. As has been shown in many decisions, the Interstate Commerce Commission is a body which like many legislative bodies is clothed with powers not only legislative in character but also with powers which are quasi judicial. When Congress has constitu-

tionally clothed the Interstate Commerce Commission with authority to investigate intrastate rates, to see whether they cast a burden upon interstate commerce, the commission has itself power to exercise quasi judicial powers to pass upon facts, and from those facts draw inferences or conclusions of law that the state legislation or the official orders of the state commission are an infringement upon the national powers which have been exerted by Congress in the protection of interstate commerce. These powers of the interstate commerce commission are frequently spoken of as quasi judicial but not truly judicial because there must always be given the opportunity to have the review in the matter of law by a judicial tribunal and that judicial action is strictly such only when a cause is presented which may result in a true judgment or decree which may be executed in accordance with processes in courts.

Counsel for plaintiffs may prepare an injunctional order in each case, and there will be no difficulty in drafting one which will meet the approval as to form.

Mr. Scott: If your Honor please, we have a draft of order ready, which we can submit to counsel, if the court wishes.

Judge Baker: We shall now direct the clerk to enter the order that we have indicated.

Mr. Olbrich: Would it be inopportune to inquire on a single point that I am not clear on in your Honor's expression? There are, for instance, numerous railroads included in this injunction whose lines are wholly in this state. The train that I came on from Madison to Wilwaukee, for instance. Now, I did not understand the scope of your Honor's decision. Does it apply to any—is an injunction to be entered restraining us from interfering with the fare to be imposed from here to Madison and Madison on to Milwaukee on trains that are wholly within the state?

Judge Baker: On trains that are wholly within the state, or railroads?

Mr. Olbrich: Well, there are both. I understood your Honor's language that it referred to trains crossing the line.

Judge BAKER: I was speaking of the status of the railroads. Is it an intrastate carrier? Take the belt line that goes down around Chicago for example. It was contending that it could not be subjected to the appliance act because it was only a 21-mile railroad in Cook County. But it was serving as a gateway for western traffic which originated in the east and came on western roads through Chicago and west through on western roads. It was held subject to the authorities with respect to the safety appliance act, and of course if there is a railroad with physical tracks that are wholly within Wisconsin it may bring itself under the interstate commerce act; it is the joint and other arrangements with other carriers, so that what is left to the state as I intended to convey to you, was like the little 70-mile railroad down in southern Illinois attacking the Illinois 2c. rate. Of course it was wholly subject to the authority of the state because they had no contract with anybody else. Now what is the character of the railroad? Simply because of the fact that these rails from A to B, those rails lying wholly in Wisconsin, does not settle the question as to whether it is a carrier subject to courts and congressional regulation. It must stay apart and keep out of interstate commerce if it expects to escape the national regulation. Now you take these complainants, I assume were all interstate carriers within the definition of Congress, were they not?

MR. OLBRICH: Well, I assume. As far as I know there are no roads in Wisconsin that do not have physical connection with some other railroad at least.

Judge BAKER: Yes.

MR. OLBRICH: But that was the exact question that I wanted to know.

JUDGE BAKER: Now, you take the Northwestern. Suppose that it runs a local train from Madison to Milwaukee. The rate on that local train is subject to congressional action and regulation, for the reason that that local train could not get anywhere except by availing itself of this instrumentality of

the interstate commerce, and the carrier itself provides that local train for the purpose of protecting its other trains.

JUDGE ALSCHULER: I think the misapprehension arose while you were referring to a train carrying a passenger, instead of a railroad.

JUDGE BAKER: I was giving that as illustrative of the discriminations that arise. I was not saying that that was the end of it. Simply because a railroad began and ended physically in Wisconsin did not determine whether it was an interstate carrier or not. It might have a traffic arrangement with other lines that made them subject to national regulation, like the belt line is, or when a carrier has a road which was established as a national highway, or if upon such national highway such national road ran a local train between point to point within a state, we find interstate rates were subject to national regulation, because that local train was using the national highway and because it was furnished by the carrier for the purpose of protecting its other trains.

MR. SCOTT: May I call your Honor's attention to the fact that in the report, in this Wisconsin case, the Interstate Commerce Commission found that all of the respondents carry both state and interstate passengers on the same trains with the same service and accommodation.

MR. FLETCHER: May I inquire, your Honor, if it wouldn't be a sufficiently clear working rule to enable us to determine what roads are entitled to decrees and what are not, to say that these carriers that have filed bills here allege that they are engaged in interstate commerce, which statement is admitted under the motion to dismiss.

MR. OLBRICH: Naturally the state of Wisconsin does not want to prosecute any other railroads, and I appreciate your Honor's explanation very much. Possibly it was my inability to get what was said, but you used the expression railroad and a branch road. Thank you.

MILWAUKEE, WISCONSIN, December 11, 1920.

(MICHIGAN CASE)

The District Court of the United States for the Eastern District of Michigan, Southern Division.

In Equity.

MICHIGAN CENTRAL RAILROAD COMPANY,
Complainant,

vs.

THE MICHIGAN PUBLIC UTILITIES COMMISSION, ET AL., *Defendants.*

Equity, No. 338.

Argued March 1, 1921—Decided March 4, 1921.

Hearing under Sec. 266 of the Judicial Code, before Denison, Circuit Judge, and Sessions and Westenhaver, District Judges.

In August, 1920, the original bill in this case was filed asking, primarily, that the state officers be enjoined from enforcing against the Railroad the Michigan two and one-half cent, intrastate, passenger rate. It was the theory of the bill that the lawful rate was three cents, pursuant to Sec. 208a of the Transportation Act. A restraining order, in accordance with the prayer of the bill, was issued and continued until the motion for a preliminary injunction was heard and decided by three federal judges on January 21, 1921. The preliminary injunction was granted as prayed for. In December, 1920, the Attorney General, on behalf of the State of Michigan, filed a bill in the Circuit Court for Ingham County asking an injunction against the railroad as hereafter more particularly stated. A restraining order was made, and the railroad filed a petition and bond for the removal of that

case to this court; but the judge of that court was of the opinion that the petition stated no cause for removal, and he therefore retained jurisdiction of the case and did not dissolve the restraining order.

On January 28, 1921, at the conclusion of an investigation which had been pending since August, 1920, the Interstate Commerce Commission made a finding and order (No. 11,762) to the effect that the intrastate rate of two and one-half cents under the state law, or three cents under the Transportation Act, consituted an unjust discrimination and undue preference against interstate traffic, and ordered that the carriers fix and observe, effective March 19, the same rate as in interstate commerce, *viz.*, 3.6 cents. Thereupon on February 19 the railroad filed, in this cause, a supplemental bill, alleging these later facts and asking an injunction to prevent interference with its observation of the interstate commerce order.

PER CURIAM:

In view of the provision of Sec. 13 (4) of the Interstate Commerce Act, as amended February 28, 1920, which, referring to such a rate as has now been established by the Commission for Michigan intrastate passenger traffic, says:

> "Such rate * * * shall be observed * * * by the carrier * * * the law of any state or the decision or order of any state authority to the contrary notwithstanding."

It is our plain duty to give the carrier the protection of the injunction now sought, unless there is some insuperable obstacle.

It has now been so many times decided by the different federal courts which are passing upon this subject and it seems so clear to us that the finding of the Commission was within the power delegated to it by Congress and within the constitutional grant of federal power, and it is so far beyond dispute that such a finding by the Commission cannot be

challenged in this court, that we pass these questions without discussion.

The existence of an injunction in a state court suggests a conflict of jurisdiction, which should be considered with great care, and with the utmost desire not to go beyond the established limits of exclusive federal jurisdiction. Three reasons are urged by the railroad why this state court litigation and restraining order cannot be permitted to embarrass this court in granting the relief asked, and they will be considered separately.

1. It is said that the court acquired jurisdiction of the subject-matter by the original bill filed in August, and, hence, that the jurisdiction was exclusive as against the action of the state court, not invoked till December. This rule is familiar, but it brings us to the question whether a restraining order, such as this court issued, is so far equivalent to taking possession of property, and whether the issue presented by the supplemental bill is so far within the field covered by the original bill, that the rule applies. It would seem that the decisions of the Supreme Court in *Looney vs. Eastern Co.*, 247 U. S. 214,221, and in the *Missouri Rate Cases*, 230 U. S. 474, 495, require these questions to be answered in the affirmative; but there may be some material distinctions in the facts, and we pass them without definite conclusion.

2. By the opinion and order of the acting district judge filed today in the state injunction case removed to this court, it is held that such cause was duly removed; that the state court was without jurisdiction to maintain the injunction or to grant any relief; and, accordingly the restraining order was vacated and the bill dismissed. It has, therefore, ceased to be an obstacle to our appropriate action in this case.

3. The bill in the state court was plainly an attempt to enjoin the railroad from obeying any order which the Interstate Commerce Commission might make raising the rate of three cents. The bill states no reason for the apprehension of the Attorney General that the railroad would charge more than three cents; but, taking judicial notice of facts and law,

which we are bound to notice, there could be no genuine apprehension of any increased charge, unless made pursuant to the order of the Commission. Unless the bill meant to charge this apprehension, it was an imposition on the court; and it therefore should receive this construction. No state court has jurisdiction of a bill for that purpose, and a state court injunction directly to that effect would be void (*Judicial Code, Secs.* 307, 308), as amended by 38 Stat. 219; *Illinois Central vs. Commission*, 245 U. S., 493, 504-5; the same thing indirectly done cannot be permitted. Even if the restraining order might be thought valid when made, its result became a prohibited thing with the making of the Interstate Commerce Commission's order; and from that moment, the United States became a necessary party to any denial of the order's valedity, and the U. S. could not be constrained save in its own courts, where and where alone it had consented to be sued.

We, therefore, must direct that the preliminary injunction issue as is now prayed. The same order, for the same reasons, will be made in each of the other twelve similar cases.

A. C. DENISON,
Circuit Judge.

C. W. SESSIONS,
D. C. WESTENHAVER,
District Judges.

Filed March 4th, 1921.
ELMER W. VOORHEIS, *Clerk*,
By ROSE REVEANO,
Deputy Clerk.

Office Supreme Court, U. S.
FILED
MAR 5 1921
JAMES D. MAHER,
CLERK

No. [redacted]206 In Equity.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

RAILROAD COMMISSION OF WISCONSIN ET AL.,
APPELLANTS,
v.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

BRIEF FOR INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE.

P. J. FARRELL,
For Interstate Commerce Commission.

MARCH, 1921.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1921

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

RAILROAD COMMISSION OF WISCONSIN et al., Appellants, v. CHICAGO, BURLINGTON & QUINCY Railroad Company, Appellee.	No. 694. In Equity.

BRIEF FOR INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE.

STATEMENT.

In this suit is questioned the validity of an order of the Interstate Commerce Commission dated November 27, 1920, made in what is known as the *Wisconsin Passenger Fares Case*, which is No. 11763 on the Commission's docket. The body of the order, to the extent it appears to be necessary to reproduce same here, reads as follows:

> This case being a proceeding instituted by the Commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission, on the date hereof, having made

and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the carriers by steam railroad parties to this proceeding, namely (names of carriers shown in order omitted here), according as they respectively participate in the transportation be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination, found in said report to exist in the relation of interstate and intrastate passenger fares and excess-baggage charges, and to establish, put in force, and maintain passenger fares and excess-baggage charges for the transportation of passengers and their baggage in intrastate commerce within the State of Wisconsin which shall exceed the fares and charges of said carriers now in force and applicable to such transportation in amounts corresponding with the increases heretofore made by said carriers and now in effect under Ex Parte 74, referred to in said report, in said carriers' passenger fares and excess-baggage charges for the transportation of passengers and their baggage in interstate commerce within the State of Wisconsin and between points in the State of Wisconsin and points in other States;

It is further ordered, That said carriers, according as they respectively participate in the transportation be, and they are hereby, notified and required to cease and desist

from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate and intrastate charges upon passengers traveling in sleeping cars and in parlor cars, and to establish, put in force, and maintain surcharges upon passengers traveling in sleeping cars and in parlor cars in intrastate commerce within the State of Wisconsin which shall correspond with the surcharges heretofore made by said carriers and now in effect under Ex Parte 74, upon passengers traveling in interstate commerce within the State of Wisconsin and between points in the State of Wisconsin and points in other States.

It is further ordered, That this order shall take effect on or before January 15, 1921, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and remain in force until the further order of the Commission.

And it is further ordered, That a copy of this order be served upon each of the carriers named in the second paragraph of this order.

In the report of the Commission, upon which the order is based, the Commission, among other things, said:

At the present time 3 cents per mile is the basis, initiated by the President, for intrastate passenger fares in Wisconsin, as the enforcement of the State 2-cent fare law has been

temporarily restrained by an order of the United States District Court for the Eastern District of Wisconsin pending hearing on its merits of an application made by the respondent carriers seeking a permanent injunction. The interstate passenger fares in the region that includes Wisconsin are in general on a basis of 3.6 cents per mile as maximum. Evidence offered by the carriers indicates that if the present intrastate fares are continued for one year and if there is the same intrastate travel during that year as in the calendar year 1919, the direct loss to the carriers, due to their failure to secure the 20 per cent increase in intrastate fares, will approximate $2,400,000, and if the 2-cent intrastate fare should become effective the loss would be approximately $6,000,000.

All of the respondents carry both State and interstate passengers on the same trains with the same service and accommodations. The State passenger, paying the lower rate, rides on the same train, in the same car, and perhaps in the same seat, with the interstate passenger who pays the higher rate. A stipulation entered into between the respondents and the Attorney General and Railroad Commission of Wisconsin reads in part as follows:

"The parties to this stipulation agree that for the purpose of this record only it shall be considered that the operating conditions and transporation conditions are substantially the same for interstate as for intrastate passenger service, but that nothing in this stipulation shall be deemed an admission by the attorney

general of Wisconsin or the Railroad Commission of Wisconsin that the cost of intrastate passenger service that is performed within the confines of Wisconsin is either as great as or greater than the cost of interstate passenger service."

The lower Wisconsin State basis is said to affect localities outside the State. For instance, it is shown that Duluth, Minn., and Superior, Wis., which are in close proximity to each other, compete for locations of industries and for retail trade, and to some extent for wholesale trade. Passengers from Wisconsin can go to and from Superior on a basis of 0.6 cent per mile less than to and from Duluth; can entirely escape the surcharge; and can have their excess baggage transported without the additional charge of 20 per cent. The situation is said to be similar at Marinette, Wis., and Menominee, Mich.; Hurley, Wis., and Ironwood, Mich.; and at other border points.

The record contains many illustrations of the way in which the Wisconsin intrastate fares have the effect of reducing the earnings on interstate traffic, or rather on what would be interstate traffic if it were not for the differences in fares. Travelers destined to or coming from points outside the State find it cheaper to pay the intrastate fare within Wisconsin and the interstate fare beyond the border than to pay the through interstate fare. A witness for respondents testified that in the past when intrastate fares were on a lower basis than interstate fares this practice was very common and very hard to eliminate.

He also testified that any condition that creates a lower level of rates intrastate than interstate can not be supported and that finally it is found necessary to reduce the interstate fares to the level of the intrastate fares.

As tending to show undue preference of or prejudice to localities, and that the through interstate fares are being defeated, respondents introduced an exhibit from which it appears that during the period August 1 to 14, 1920, inclusive, 1,367 tickets were sold from Marinette, Wis., to 12 stations in Wisconsin on the Chicago & North Western, while during the same period in September 2,021 tickets were sold, an increase of 47.7 per cent. During the same periods 479 and 357 tickets, respectively, were sold from Menominee, Mich., to the same stations, a decrease of 25.4 per cent. Marinette and Menominee are on opposite sides of the Menominee River. From Hurley, Wis., to 10 stations in Wisconsin on the Chicago & North Western, 713 tickets were sold during the period August 1 to 14, 1920, inclusive, and 964 during the corresponding period in September, an increase of 35.2 per cent. From Ironwood, Mich., a point directly opposite Hurley, to the same stations, 953 tickets were sold during the August period and 601 during the September period, a decrease of 36.9 per cent. During the period August 1 to 21, 1920, inclusive, the tickets sold and cash fares collected between Ashland, Wis., and Duluth, Minn., and between Ashland and Superior, Wis., were

1,624 and 842, respectively. During the same period in September the figures were 1,280 and 1,152, respectively.

A direct result of the practice of buying passenger tickets again at or near State lines, thereby defeating the through interstate fares, is to convert, so far as the revenues of the carriers are concerned, interstate commerce into intrastate commerce. It also results, where there are two or more routes between two given points, in passengers using the route which has the longest mileage within the State carrying the lower intrastate fare. For example, a passenger from Milwaukee to St. Paul on the Chicago & North Western can purchase an intrastate ticket to Hudson, Wis., for $9.14 and an interstate ticket from Hudson to St. Paul for 70 cents, a total of $9.84. The passenger on the Chicago, Milwaukee & St. Paul who desires to pursue a like practice will purchase an intrastate ticket to La Crosse, Wis., for $5.91, and an interstate ticket from La Crosse to St. Paul for $4.77, a total of $10.68, or 84 cents higher than the combination via the Chicago & North Western. The through interstate fare from Milwaukee to St. Paul via both routes is $11.67.

What has been said with respect to passenger fares applies in like manner to the surcharge upon passengers in sleeping and parlor cars.

Inasmuch as the excess-baggage charges are arranged upon a scale bearing a fixed relationship to passenger fares and correspondingly graded in amount, such charges are governed by the passenger fares, and any discrimination

in passenger fares necessarily entails a like discrimination in excess-baggage charges.

There is little or no evidence in the record as to the relationship of intrastate and interstate commutation or other multiple forms of tickets, excursion, convention, or other fares for special occasions, or club-car charges, and no finding will be made with respect thereto.

* * * * *

As stated before, the present basis of intrastate fares in Wisconsin is that of 3 cents per mile initiated by the President through General Order No. 28 of the Director General of Railroads, effective June 10, 1918. At that time, and until the increase of 20 per cent in interstate fares authorized by our report in *Increased Rates, 1920, supra*, became effective on August 26, 1920, the basis of both intrastate and interstate fares was the same. The reasons for increase in interstate fares are set forth in our report last cited. They included the wage award then recently made by the Labor Board. The Wisconsin commission declares that it has no power to grant any increase. The record upon which we based our report and order in *Increased Rates, 1920, supra*, is a part of the record in this proceeding.

Following the New York and Illinois cases, and upon this record, subject to the exception above noted in respect to commutation or other multiple forms of tickets, excursion, convention, or other fares for special occasions, and club-car charges, we are of opinion and find that the increases made by the respondent steam railroads under Ex Parte

74, relating to passenger fares and baggage charges, and now in effect, result in reasonable passenger fares and excess-baggage charges for interstate transportation within the group considered in this proceeding, and that the failure of said respondents to increase the standard intrastate fares and charges correspondingly within the State of Wisconsin has resulted and will result in intrastate fares and charges lower than the corresponding interstate fares and charges; in undue prejudice to persons traveling in interstate commerce within the State of Wisconsin and between points in the State of Wisconsin and points in other States; in undue preference of and advantage to persons traveling intrastate in Wisconsin; and in unjust discrimination against interstate commerce.

We further find that said undue prejudice and preference and unjust discrimination can and should be removed by making increases in said intrastate passenger fares and excess-baggage charges which shall correspond with the increases heretofore made by said respondents as aforesaid in interstate passenger fares and excess-baggage charges.

We further find that the surcharges made by said respondent steam railroads under Ex Parte 74 upon passengers in sleeping and parlor cars result in reasonable charges upon passengers so traveling in interstate commerce in the group considered in this proceeding, and that the failure of said respondents to make corresponding surcharges upon passengers so traveling in intrastate commerce

within the State of Wisconsin has resulted and will result in intrastate charges lower than the corresponding interstate charges; in undue prejudice to persons so traveling in interstate commerce within the State of Wisconsin and between points in the State of Wisconsin and points in other States; in undue preference of and advantage to persons so traveling intrastate in Wisconsin; and in unjust discrimination against interstate commerce.

We further find that said undue prejudice and preference and unjust discrimination can and should be removed by making surcharges upon passengers so traveling in intrastate commerce which shall correspond with the surcharges heretofore made as aforesaid upon passengers so traveling in interstate commerce.

We further find that, whether the aforesaid passenger fares, excess-baggage charges, or surcharges pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services in each instance are performed by the carriers under substantially similar circumstances and conditions. Tariffs may be made effective on not less than five days' notice.

These finding s are without prejudice to the right of the authorities of the State of Wisconsin or of any other party in interest to apply in the proper manner for a modification of our findings and order as to any specified intrastate fares or charges on the ground that the latter are not related to the interstate fares or charges in such a way as

to contravene the provisions of the interstate commerce act. (59 I. C. C., 391, 393–397.)

In making the aforesaid report, findings and order, the Commission acted under authority conferred, and in response to duties imposed, upon it, by paragraphs (3) and (4) of section 13 and paragraphs (2) and (3) of section 15a, of the interstate commerce act, which read:

> SEC. 13 (3) Whenever in any investigation under the provisions of this act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be

affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 15a. (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time

to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment,

which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

The record in proceeding *Ex Parte* 74, 58 I. C. C. 220, above mentioned, was made under circumstances described by the Commission, in its report in said proceeding, as follows:

> In this proceeding the carriers by railroad subject to our jurisdiction seek authority, pursuant to the provisions of section 15a of the interstate commerce act, to increase their freight revenues to a basis that will enable them to earn an aggregate annual net railway operating income equal, as nearly as may be, to 6 per cent upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. The applications, which were filed in the latter part of April and the early part of May, 1920, were made at our suggestion to assist us in complying with the provisions of that section. Similar applications were filed on the part of certain carriers by water. Hearings were held in Washington in May, June, and July, 1920, and the case was submitted upon briefs and oral argument on July 6, 1920. In accordance with the provisions of paragraph 3 of section 13 of the interstate commerce act we invited the State commissions to cooperate with us in this proceeding, and there were appointed three representatives of those commissions, Hon. William D. B. Ainey, chairman of the Public Service Commission of Pennsylvania; Hon. Royal C. Dunn, of the Railroad

> Commission of Florida; and Hon Jno. A. Guiher, of the Railroad Commission of Iowa, who sat with us throughout the hearings and oral argument and joined with us in conferences antecedent to our determination of the matters in issue. (Id. 223–224.)

As shown in said report, pages 224 to 226 inclusive, the Commission, in accordance with requirement contained in said section 15a, separated the continental United States into four groups, designated respectively Eastern, Southern, Western, and Mountain-Pacific.

In connection with the values upon which the carriers should be permitted to earn a fair return, the Commission said:

> In the administration of section 15a of the interstate commerce act it becomes necessary for us to determine, as nearly as may be, the aggregate value of the railway property of the carriers defined in that section, held for and used in the service of transportation. In making this determination, we are authorized to utilize the results of our investigation under section 19a of the act, in so far as we deem such results available; and we are required to give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and are required to give to the property investment account of the carriers only that consideration, which, under such law, it is entitled to in establishing values for rate-making purposes.

Considerable evidence of a general character as to the various elements of value has been produced herein, which we have carefully scrutinized.

While the valuation of the railroads under section 19a of the interstate commerce act is still incomplete, the work has progressed so far that the results are of value and informative in reaching the determination we are now required to make. So far as the work has produced results, either as to particular roads, or as showing general tendencies and principles, we have given consideration thereto. As will appear from examination of our various valuation reports, and from section 19a itself, our investigations under that section are designed to give information as to the original cost of the property, the cost of reproduction new, the accrued depreciation, the amount of the investment, the corporate histories of the properties, the values of the lands, and other values and elements of value, if any.

We have also before us the investment accounts of the carriers. Since 1907 there have been mandatory regulations by us as to the manner in which the investment accounts should be kept. In the administration of section 20 of the interstate commerce act we have had frequent occasion to investigate, and in many cases to correct, errors apparent in the investment accounts; other errors have been discovered and brought to our attention in the progress of the work of valuation under section 19a.

The probable earning capacity of the properties under particular rates prescribed by law and the sums required to meet operating expenses, separately and collectively, are indicated in the record.

There is also evidence which tends to show the amount and market value of the bonds and stocks of the carriers.

In properly appraising all these elements of value we are mindful of the fact that the carriers are operating units and going concerns. This fact has been given due consideration in the light of the financial history of the transportation system of the United States, as developed by the record and as known to us. The needs for working capital, and materials and supplies on hand have been considered and allowance therefor has been made.

From a consideration of all of the facts and matters of record, and those which, under section 15a of the interstate commerce act, we are both required and authorized to consider, we find that the value of the steam-railway property of the carriers subject to the act held for and used in the service of transportation is, for the purposes of this particular case, to be taken as approximating the following:

Eastern group, as defined by the carriers	$8,800,000,000
Southern group, as defined by the carriers	2,000,000,000
Western group, as defined by the carriers, including both the Western and Mountain-Pacific groups herein designated	8,100,000,000
Total	18,900,000,000

> It is not deemed necessary, for present purposes, to apportion the aggregate value of the properties in the western group, as defined by the carriers, so as to show the value of the properties in the Western and Mountain-Pacific groups as we have here defined them. Many of the important railroads are in and serve both groups into which we have divided the carriers' western group. It is not thought advisable to delay the decision of this matter to permit an accurate apportionment of the value of such properties, particularly as the result could not materially affect the determination we reach.
>
> The record does not permit the estimation of the aggregate value of the properties of electric railways, other than those operated by steam roads, or of the boat lines, both of which have been made the subject of independent representations in this proceeding. (Id. 228–230.)

After showing that, pending the investigation before the Commission, the Labor Board increased the wages of the carriers' employees to the extent of approximately $618,000,000, the Commission said:

> As above noted, in the original applications the carriers proposed to obtain the desired additional revenue by general percentage increases in the respective groups, applicable to freight traffic only. No increases were suggested upon passenger, express, or mail traffic. In their amended proposals, following the wage award of the Labor Board, they propose to make increases upon all classes of traffic. (Id. 239.)

In stating its conclusion that, in addition to the 5½ per cent return prescribed by Congress as above shown, the carriers were entitled to earn ½ of 1 per cent "to make provision in whole or in part for improvements, betterments or equipment," the Commission said:

> The increases here authorized are intended to yield the additional ½ of 1 per cent. The record leaves no doubt as to the needs of the country for additional transportation facilities. All carriers participating in the increases will be expected to make appropriate provision for additional improvements, betterments, or equipment of a character chargeable to capital account and to make report to us semi-annually, as of December 31 and June 30, showing what portion of the increased revenue resulting from the increases here authorized has been devoted to that purpose. (Id. 246.)

For the purpose of providing, as nearly as might be, for such aggregate 6 per cent return, the Commission found that, generally speaking, freight rates should be increased 40 per cent in the Eastern group, 25 per cent in the Southern group, 35 per cent in the Western group, and 25 per cent in the Mountain-Pacific group. (Id. 246.) And, in connection with the increases under consideration in this suit, the language of the Commission was as follows:

> We conclude that increases as indicated next below may be made by all steam railroads subject to our jurisdiction serving the territory embraced in the groups hereinbefore designated.

1. All passenger fares and charges may be increased 20 per cent. The term "passenger fares" may be considered to include standard local or interline fares; excursion, convention, and other fares for special occasions; commutation and other multiple forms of tickets; extra fares on limited trains; club car charges.

2. Excess-baggage rates may be increased 20 per cent, provided that where stated as a percentage of or dependent upon passenger fares the increase in the latter will automatically effect the increase in the excess-baggage charges.

3. A surcharge upon passengers in sleeping and parlor cars may be made amounting to 50 per cent of the charge for space in such cars, such charge to be collected in connection with the charge for space, and to accrue to the rail carriers. (Id. 242.)

The Commission's reports in the New York and Illinois State cases above mentioned are contained, respectively, in 59 I. C. C., 290, and in 60 I. C. C., 92.

The appellants' contentions, as we understand them, may be summarized as follows: (1) The question of whether rates, fares or charges fixed by a State authority conflict with rates, fares or charges fixed by a Federal authority is a question of fact which must be determined ultimately by the court; (2) in making the order involved in this suit the Commission acted arbitrarily, in that it undertook to control rates, fares and charges which are *purely* intrastate; (3) the Commission construed erroneously the authority conferred upon it by the interstate

commerce act as amended by the transportation act, and (4) in making the order the Commission exercised authority which Congress can not exercise, or confer upon the Commission, without violating the Constitution of the United States.

In this brief we will endeavor to support, in each instance, the opposite of these contentions.

ARGUMENT.

I.

In reviewing orders of the Commission the courts are confined to the determination of judicial questions and do not pass upon or determine administrative questions.

It will be observed that the conflict to which appellant refers results from the fact that the passenger fares, excess baggage charges, and surcharges on passengers traveling in sleeping and parlor cars, for intrastate transportation within the State of Wisconsin, are on a basis lower than the level of the interstate passenger fares, excess baggage charges, and surcharges on passengers traveling in sleeping and parlor cars, for transportation within Wisconsin and between points in that State and points in other States, and that, because of this disparity and its results, the Commission has found that the intrastate commerce is unduly and unreasonably preferred and the interstate commerce unduly and unreasonably prejudiced and unjustly discriminated against. That these findings of the Commission are findings of fact was decided in

Texas & Pacific Railway Company v. *Interstate Commerce Commission*, 162 U. S. 197, wherein the court said:

> The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were "like and contemporaneous," whether the kinds of traffic were "like," whether the transportation was effected under "substantially similar circumstances and conditions." To answer such questions, in any case coming before the Commission, requires an investigation into the facts: * * *
>
> The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact. * * * (Id. 219.)

Also, that these findings of fact are administrative in character and binding upon all parties, including the courts, in the absence of a showing that in making them the Commission has acted unlawfully, has been announced by this court in several cases. In *Procter & Gamble Company* v. *United States, Interstate Commerce Commission, et al.*, 225 U. S. 282, the court said:

> Originally the duty of the courts to determine whether an order of the Commission

> should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so. * * * (Id. 297–298.)

And in *United States* v. *Louisville & Nashville Railroad Company*, 235 U. S. 314, pertinent language of the court was as follows:

> In view of the doctrine announced in *Interstate Commerce Commission* v. *Illinois Cent. R. R.*, 215 U. S. 452; *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Interstate Commerce Commission* v. *Louisville & Nashville R. R.*, 227 U. S. 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be

most fitted to primarily decide whether from facts, disputed or undisputed, in a given case, preference or discrimination existed. * * * (Id. 320.)

II.

In making the order here involved the Commission did not act arbitrarily.

We have shown that, prior to making the investigation in proceeding *Ex Parte* 74, *supra*, in accordance with the authority conferred upon it by paragraph (3) of section 13 of the act, the Commission invited the State commissions to cooperate with it, and that as a result of the invitation three State commissioners, one from Pennsylvania, another from Iowa, and another from Florida, chosen to represent them by the State commissions, sat with the Commission throughout the hearings and oral argument and joined with it in conferences antecedent to the Commission's determination of the matters in issue; that hearings in the investigation were begun in the month of May, 1920, and were not concluded until the 6th day of the following July; that the investigation was instituted for the purpose of enabling the Commission to comply with the mandate to initiate, modify, establish and adjust rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission might designate) shall earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of their

railway property, held for and used in the service of transportation, and that the record made in said proceeding was a part of the record upon which was based the order under consideration here. But this is not all. As shown in the report upon which said order is based, the Commission did not make the order until after it had held an additional hearing pursuant to a petition filed in its office by the interested carriers, and until after the commission of the State of Wisconsin had acted unfavorably in the premises, upon an application made by the carriers. Pertinent language of the Commission, contained in said report, is as follows:

> Prior to our decision of July 29, 1920, in *Increased Rates, 1920, supra*, the carriers by steam railroad operating in the State of Wisconsin had applied to the railroad commission of that State, hereinafter referred to as the Wisconsin commission, for permission to make increases in their intrastate rates, fares, and charges similar to those which should be authorized by us on interstate traffic. Hearings were held by the Wisconsin commission, and all of the evidence before us in Ex Parte 74 was made part of the record before it. In so far as the applications related to charges for freight service and rates on milk and cream, they were granted, with exceptions not here material, by report and order of the Wisconsin commission dated August 16, 1920, and the increases became effective August 26, 1920, contemporaneously with the increases in interstate rates and charges.

Increases in intrastate passenger fares and excess-baggage charges, and the surcharge upon intrastate passengers in sleeping and parlor cars, were not allowed. A 20 per cent increase on intrastate commutation fares was also granted by the Wisconsin commission, with the proviso that such fares should not exceed the fares provided for in section 1798a of the Wisconsin statutes, hereinafter referred to. In denying increased passenger fares on intrastate traffic the Wisconsin commission said:

"The Railroad Commission of Wisconsin was created by an act of the legislature of 1905 and by that act was given jurisdiction to fix and determine reasonable passenger fares on intrastate traffic on railroads in the State of Wisconsin. It exercised this jurisdiction in 1907, fixing a cash fare rate of two and one-half cents per mile. In 1907, the legislature passed an act known as section 1798a as follows:

"'No corporation operating a railroad in this State, the gross receipts of which are or exceed three thousand five hundred dollars per mile per annum, shall demand, collect or receive a greater compensation for the transportation of persons than two cents per mile; and every such corporation shall, at its ticket stations within this State on its lines of road, sell tickets at a price not to exceed two cents per mile, but no such corporation shall be compelled to accept a single fare of less than five cents.'

"This section was applicable to all of the larger lines in Wisconsin and was observed by them until the period of Federal control. During that period, all passenger fares, both interstate and intrastate, were advanced to a basis of three cents per mile, such rates becoming effective about June 10, 1918, and being in effect February 29, 1920.

"Since the passage of the two-cent fare act, this Commission has been without jurisdiction over passenger fares on the lines specified in excess of two cents. In our opinion, we are still without such jurisdiction and can not approve any tariffs in violation of that act.

* * * * *

"The sole question decided here is the jurisdiction of the Commission. The application of carriers in this respect is denied."

Thereafter certain carriers by steam railroad operating in Wisconsin filed with us a petition, later amended, on their own behalf and on behalf of all steam railroads operating in that State, for relief in accordance with the provisions of section 13 of the interstate commerce act. This proceeding, to which all railroads subject to our jurisdiction operating in the State of Wisconsin have been made parties respondent, was then instituted, on our own motion—

"to determine whether the rates, fares, and charges required by authority of the State of Wisconsin to be maintained by said railroads, cause or will cause any undue or unreasonable advantage, preference, or prejudice as between

> persons or localities in intrastate commerce on the one hand, and interstate commerce or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; and as to what rates, fares, and charges, if any, or what maximum or minimum or maximum and minimum shall be prescribed to be charged by the petitioners, in order to remove such advantage, preference, prejudice, or discrimination, if any, as may be found to exist." (Id. 391-393.)

Under the circumstances, we think it can not consistently be contended either that the Commission acted arbitrarily, in fact, or that it manifested a disposition to do so. However, appellants say the Commission's order is not confined to specific discriminations, but applies generally instead to all fares and charges of certain classes applied to intrastate transportation within the State of Wisconsin, and that, therefore, the order covers fares and charges for transportation which is *purely* intrastate.

The rule to be applied in determining whether commerce is *purely* intrastate is clearly indicated by the decision of this court in *Houston, East and West Texas Railway Company* v. *United States*, 234 U. S. 342, where, in speaking of the power of Congress over interstate commerce, the language of the court was:

> * * * Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to

> control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. * * * (Id. 351–352.)

As above shown, the Commission found that all the fares and charges covered by the order under con-

sideration were unjustly discriminatory against interstate commerce. It is therefore apparent that the order is fully supported by the findings, and since the court must assume that the latter are based upon substantial evidence in a suit of this kind, where the record upon which the findings are based is not before the court for consideration, we are unable to see how, in view of the ruling of the court above set forth, appellants' contention that the order covers commerce which is *purely* intrastate can be sustained. However, even if appellants were free to prove that the Commission's findings are not supported by substantial evidence, we feel certain they could not do so, because, according to our view, there are statements of fact in the report of the Commission which are not, and could not consistently be, contradicted, and which support amply the Commission's conclusions of fact concerning unjust discrimination, undue preference and advantage, and undue prejudice and disadvantage.

In its report the Commission stated: That the interstate passenger fares in the region that includes Wisconsin are in general on a basis of 3.6 cents per mile; that the intrastate passenger fares in Wisconsin were, at the time the order was made, on a basis of 3 cents per mile; that if the State law, the enforcement of which has been temporarily restrained by the United States District Court, should become effective, the intrastate rates would be reduced to a basis of 2 cents per mile; that the disparity of 6 mills per mile mentioned causes a loss to the interstate carriers

of approximately $2,400,000 a year; that if the 2-cent fare should become effective this loss would be increased to $6,000,000; that said carriers all transport both intrastate and interstate passengers, on the same trains, and with the same service and accommodations; that according to a stipulation entered into by and between the carriers on the one hand and the Attorney General and Railroad Commission of Wisconsin on the other hand, it is agreed that the operating and transportation conditions pertaining to the interstate passenger service are substantially the same as those pertaining to the intrastate passenger service; that the disparities in passenger fares result in advantages to those interested in retail and wholesale trade in Wisconsin and subject others interested in such trade, but located outside of Wisconsin, to corresponding disadvantages; that said disparities destroy interstate commerce and decrease the revenues of the carriers by enabling the carriers' patrons to purchase and use the lower intrastate fares for parts of journeys over the carriers' lines of railway which would otherwise be entirely interstate, and by compelling carriers, the mileage of whose lines of railway in Wisconsin is comparatively small, and who must compete with carriers whose mileage of railway in that State is comparatively large, to reduce their interstate fares to the aggregate which may be made by combining intrastate with interstate fares in traveling over the lines of said competitors, and that the conditions

above described apply also to the surcharges upon passengers traveling in sleeping and parlor cars and to the excess-baggage charges, covered by said order.

The appellants do not show either that the cost per unit to the carriers is less in connection with the intrastate traffic than in connection with the interstate traffic, or that the general level of the interstate fares and charges is not greater than the general level of the intrastate fares and charges, and it is apparent, we think, that if they should attempt to do so they would not be successful. It is a matter of common knowledge that the same trains in which passengers and their baggage are transported in interstate commerce carry also passengers and their baggage in intrastate commerce, and that the average distance over which the interstate passenger is transported is somewhat greater than the average distance over which the intrastate passenger is transported, and from these conditions it necessarily follows that the per-unit cost to the carriers of the intrastate traffic is at least as great as the cost per unit to them of the interstate traffic.

It is apparent that, in addition to the matters above mentioned, other matters of a similar nature might be referred to, but we think what we have said clearly shows that in making the order here involved the Commission did not act arbitrarily, within the judicial meaning of that term, or without evidence which supports fully the findings upon which the order is based.

III.

In making said order the Commission acted in conformity with the authority conferred and the duties imposed upon it by the interstate commerce act.

Pertinent provisions of the act have already been called to the attention of the court, and we have shown that the Commission availed itself of the authority conferred upon it, by paragraph (3) of section 13, to hold joint hearings with, and to avail itself of the cooperation, services, records, and facilities of, State authorities.

By paragraph (4) of said section 13 it is provided that where, in such a proceeding, the Commission finds that rates, fares, or charges like those involved here cause "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," it shall prescribe the rates, fares, or charges, therafter to be charged, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination; and further provides that the rates, fares, and charges so prescribed shall be observed while in effect by the carriers party to such proceeding affected thereby; and that the Commission made findings and prescribed fares and charges in conformity with said provisions clearly appears in the report and order of the Commission which are under con-

sideration here. Therefore, extended discussion by us in this connection is unnecessary, and would, according to our view, be unjustifiable.

Appellants contend that the order is indefinite, but we think an examination of it will suffice to show that this assertion is not well founded. In the order, the classes of traffic to be affected by the intrastate fares and charges to be put in force are definitely described in unambiguous language, and the carriers who are required to comply with the terms of the order are plainly designated. Also, the territory within which the fares and charges are to be applied is pointed out with certainty.

Appellants further contend, as we understand the argument made by them in the lower court, that the disparities in fares and charges to which the attention of the court has been called do not even tend to prove that the lower intrastate fares and charges are unjustly discriminatory against the commerce to which the higher interstate fares and charges are applied. In support of this contention they set forth the fact that the words "undue burden," which were in section 415 of the transportation act at the time it was passed by the House, were stricken out by the conference committee of the House and Senate.

What was, in fact, done by the conference committee clearly appears from Conference Report No. 650, dated February 18, 1920, from which we quote as follows:

> Section 415 of the House bill provided that the Commission should have authority to

make such findings and orders as might in its judgment tend to remove any undue advantage, preference, or prejudice as between persons or localities in interstate commerce on the one hand, and intrastate or foreign commerce on the other hand, or any undue burden on interstate or foreign commerce; and that such findings or orders should be observed by the carriers; the law of any State or the decision or order of any State authority to the contrary notwithstanding. The Senate amendment provided that the Commission shall make such findings and orders as will in its judgment remove any undue or unreasonable advantage, preference, or prejudice as between persons or localities in interstate or intrastate and foreign commerce, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, and shall make the rates which, in its judgment, will remove such advantage, preference, or prejudice. The Senate amendment further declared that nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States or other local authorities in relation to taxation or the lawful police powers of the several States, including the power to make intrastate rates, except as provided otherwise in the interstate commerce act.

The conference bill in section 416 provides that whenever the commission finds that any rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable

advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate and foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, it shall prescribe the rate, fare, or charge or the classification, regulation, or practice in such manner as in its judgment will remove such advantage, preference, prejudice, or discrimination. The carriers are compelled to observe the orders of the commission, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

It will be observed that when the conference committee struck out the words "undue burden" it inserted in lieu thereof the much more comprehensive words, "undue, unreasonable, or unjust discrimination," and it will be further observed that at the same time the committee eliminated entirely the qualifying words, "that nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States or other local authorities in relation to taxation or the lawful police powers of the several States, including the power to make intrastate rates, except as provided otherwise in the interstate commerce act." Also, as the transportation act was finally passed by Congress and became a law, it both authorized and required the Commission, as paragraph (4) of section 13 of the interstate commerce act shows, to prescribe such intrastate rates, fares, charges, classifications, regu-

lations, or practices, as the Commission might consider necessary to remove such discriminations against interstate or foreign commerce as the Commission might find to be unjust and to be caused by intrastate rates, fares, charges, classifications, regulations, or practices, and provided further that the intrastate rates, etc., so prescribed by the Commission should be observed while in effect by the carriers, parties to the proceeding before the Commission, affected thereby, "the law of any State or the decision or order of any State authority to the contrary notwithstanding."

It thus appears that, instead of limiting the Commission to matters other than disparities between intrastate rates, fares and charges on the one hand and interstate rates, fares and charges on the other hand, Congress manifested an intention to leave the Commission entirely free to consider and give effect to any and all evidence tending to prove the existence of the preference, prejudice and discrimination forbidden and declared to be unlawful by paragraph (4) of section 13 of the interstate commerce act.

Appellants contend that the transportation act did not "increase the pre-existing jurisdiction of the Commission as to discrimination," but we are unable to see how this contention can be sustained. As above shown the transportation act amended the interstate commerce act by forbidding and declaring to be unlawful unjust discrimination against interstate or foreign commerce, caused by intrastate

rates, fares, charges, classifications, regulations, or practices, and by requiring the Commission to prescribe the rates, etc., it might consider necessary to remove such discriminations of the kind mentioned as it might, after full hearing in the premises, find in existence.

In our opinion these amendments are significant, for the reason that Congress had previously defined, to some extent at least, the term "unjust discrimination," as the charging, demanding, collecting, or receiving, by a common carrier subject to the interstate commerce act, from any person or persons a greater or less compensation for services rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of the act, than the carrier charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. (Section 2, I. C. Act.)

Appellants also contend that the order of the Commission is invalid because said section 15a does not require the Commission to base, and because the Commission has not based, its order concerning the intrastate fares and charges upon a division of the value of the railway property, that is, upon a separate value of the property used by the carriers for common-carrier purposes which may be regarded as used exclusively in intrastate commerce. In making this contention, however, we think appellants overlook the

fact that where the interstate and intrastate transactions of carriers are "so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule," and further overlook the fact that the dominant rule prescribed by Congress in said section 15a requires the Commission to initiate, modify, establish or adjust rates so that carriers as a whole (or as a whole in each of such rates groups or territories as the Commission may from time to time designate) will earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the *aggregate* value of the railway property of such carriers held for and used in the service of transportation.

In the *Shreveport Case* above mentioned this court, after referring to the cases of *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co.* v. *United States*, 222 U. S. 20, 26, 27; *Second Employers' Liability Cases*, *supra*, pp. 48, 51; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 205, 213; *Minnesota Rate Cases*, 230 U. S. 352, 431; *Illinois Central Railroad Co.* v. *Behrens*, 233 U. S. 473, used the following pertinent language:

> In *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, *supra*, the argument against the validity of the hours of service act (March 4, 1907, c. 2939, 34 Stat. 1415) involved the consideration that the interstate and intrastate transactions of the

carriers were so interwoven that it was utterly impracticable for them to divide their employees so that those who were engaged in interstate commerce should be confined to that commerce exclusively. Employees dealing with the movement of trains were employed in both sorts of commerce; but the court held that this fact did not preclude the exercise of Federal power. As Congress could limit the hours of labor of those engaged in interstate transportation, it necessarily followed that its will could not be frustrated by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations. Again, in *Southern Railway Co.* v. *United States*, *supra*, the question was presented whether the amendment to the safety appliance act (March 2, 1903, c. 976, 32 Stat. 943) was within the power of Congress in view of the fact that the statute was not confined to vehicles that were used in interstate traffic but also embraced those used in intrastate traffic. The court answered affirmatively, because there was such a close relation between the two classes of traffic moving over the same railroad as to make it certain that the safety of the interstate traffic, and of those employed in its movement, would be promoted in a real and substantial sense by applying the requirements of the act to both classes of vehicles. So, in the *Second Employers' Liability Cases*, *supra*, it was insisted that while Congress had the authority to regulate the liability of a carrier for injuries sustained by one

employee through the negligence of another, where all were engaged in interstate commerce, that power did not embrace instances where the negligent employee was engaged in intrastate commerce. The court said that this was a mistaken theory, as the causal negligence when operating injuriously upon an employee engaged in interstate commerce had the same effect with respect to that commerce as if the negligent employee were also engaged therein. The decision in *Employers' Liability Cases*, 207 U. S. 463, is not opposed, for the statute there in question (June 11, 1906, c. 3073, 34 Stat. 232) sought to regulate the liability of interstate carriers for injuries to any employee even though his employment had no connection whatever with interstate commerce. (See *Illinois Central R. R. Co.* v. *Behrens*, *supra*.)

While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of State authority alter the matter, where Congress has acted, for a State may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden. (Id. 352–354.)

* * * * *

It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of

its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

Having this power, Congress could provide for its execution through the aid of a subordinate body; and we conclude that the order of the Commission now in question can not be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer. (Id. 355.)

IV.

The provisions of law involved are not in conflict with the Constitution of the United States.

We have shown that in making and issuing the order involved in this suit the Commission did not exceed the authority conferred upon it by the interstate commerce act as amended by the transportation act, 1920, and in doing so we called attention to the provisions of law under which the Commission operated. We think an examination of these provisions will be entirely sufficient to demonstrate that in making them Congress did not manifest any intention to interfere, or to authorize the Commission to interfere, with rates, fares, or charges for the transportation of passengers or property in commerce which is *purely* intrastate. The appellants contend that Congress did so interfere, and we understand this

to be, in substance, the only claim advanced by them in support of their contention that the action of Congress referred to is unconstitutional.

In *Gibbons* v. *Ogden*, 9 Wheaton 1, pertinent language of this court was:

> * * * If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. (Id. 196.)

In *Houston, East and West Texas Railway Company* v. *United States*, 234 U. S. 342, commonly called the Shreveport case, it was contended, "That Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent injurious discrimination against interstate traffic;" and in holding the contention to be unsound this court, among other things, said:

> It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to

make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating State legislation." By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 224; *Brown* v. *Maryland*, 12 Wheat. 419, 446; *County of Mobile* v. *Kimball*, 102 U. S. 691, 696, 697; *Smith* v. *Alabama*, 124 U. S. 45, [465] 473; *Second Employers' Liability Cases*, 223 U. S. 1, 47, 53, 54; *Minnesota Rate Cases*, 230 U. S. 352, 398, 399.

Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement" (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*County of Mobile* v. *Kimball*, *supra*); "to foster, protect, control, and restrain" (*Second Employers' Liability Cases*, *supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which

> interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard, or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the govermnent of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. (Id. 350-352.)

We thus see that the power of Congress over interstate and foreign commerce is full and complete; that where it exists it dominates; that it was vested in Congress to secure uniformity of regulation against conflicting and discriminating State legislation and to protect the national interest by securing the freedom of interstate commercial intercourse from local

control; that such power enables Congress to enact all appropriate legislation for the protection and development of interstate and foreign commerce; that this power necessarily embraces the right to control the operations of interstate carriers in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance, and that, wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule.

That the constitutional power of Congress over interstate and foreign commerce, as that power is defined in the above-mentioned decisions, and in a large number of other decisions, of this court, which might be referred to, was not exceeded in enacting the provisions of law here involved is so clearly apparent, when the definitions are compared with the powers exercised, that, in our opinion, further argument in this connection is unnecessary.

In paragraph (4) of section 13 of the interstate commerce act, above quoted, it will be seen that all Congress did was to authorize the Interstate Commerce Commission to make orders which would remove and prevent any undue or unreasonable

advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, and any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; and that by paragraphs (2) and (3) of section 15a Congress simply authorized and required the Commission to initiate, modify, establish and adjust rates so that carriers as a whole, or as a whole in each rate group or territory which the Commission may from time to time designate, may earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.

It is true, that by said paragraph (3) Congress fixed, for two years beginning March 1, 1920, the annual net railway operating income at 5½ per centum of said aggregate value, except that it authorized the Commission, in its discretion, to increase said percentage to 6. In this connection, however, we do not apprehend that an effort will be made by the appellants to show that this action of Congress is in excess of its constitutional power.

At the time matters covered by the transportation act were being discussed, Congress was confronted with the necessity of preserving and strengthening the interstate common carriers of the country, and making them efficient and serviceable agencies for the transportation of interstate and foreign com-

merce, and also for the transportation of intrastate commerce. Under these circumstances we think it is obvious that the most important matter presented for consideration was the means by which the necessary railway operating revenues might be secured. After several months of discussion, deliberation and reflection, Congress perfected and put into operation the plan now under consideration, and our understanding of a large number of decisions heretofore rendered by this court convinces us that, in taking this action, Congress did not exceed its power under the Constitution of the United States. In *McCulloch* v. *Maryland*, 4 Wheat. 316, pertinent language of the court was as follows:

> * * * Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. (Id. 420.)

For the reasons above set forth we insist that the appeal in this suit should be dismissed.

Respectfully submitted.

P. J. FARRELL,
Counsel for Interstate Commerce Commission.

○

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SUPREME COURT OF UNITED STATES

October Term, 1920

No. 406 IN EQUITY.

RAILROAD COMMISSION OF WISCONSIN, ET AL.,
APPELLANTS.

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

BRIEF FILED ON BEHALF OF NATIONAL ASSOCIATION OF OWNERS OF RAILROAD SECURITIES AS AMICUS CURIAE.

FORNEY JOHNSTON,
Of Counsel.

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Supreme Court of the United States

October Term, 1920

No. 694—In Equity.

RAILROAD COMMISSION OF WISCONSIN, ET AL., Appellants.

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellee.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Brief Filed on Behalf of National Association of Owners of Railroad Securities as Amicus Curiae.

Adjustments of the Rate Level as a Whole Under Transportation Act, 1920.

By the adoption of Section 422 of the Transportation Act, 1920, the Congress inaugurated a far reaching change in the economics of rate making, applicable alike to interstate and intrastate rate levels; and authorized a process of ready adjustment which it made obligatory upon the Interstate Commerce Commission. This procedure was authorized and required without necessary reference to the question of undue discrimination under Section 3 of the Interstate Commerce Act, as amended and enlarged by Section 416 (3) (4) of the Transportation Act. The conclusive finding of undue discrimina-

tion accompanying the order involved on this appeal is, of itself alone, adequate to sustain the order; but that finding is not in any case of adjustment of rate levels by the Interstate Commerce Commission under Section 422, and was not in this case, necessary to the exertion by the Commission of its jurisdiction over intrastate rate levels and their relationship to the interstate rate structure.

It is necessary that this situation be borne in mind in any consideration of this profoundly important appeal. The turning post of the Transportation Act is Section 422. The provisions of that section mark the third phase of railway regulation in the United States. It constitutes the most fundamental change in the federal interstate commerce laws since the adoption of that statute in 1887. It is based on net railway operating income, which is made up of the aggregate earnings resulting from interstate and intrastate operations. Bearing in mind this fundamental consideration, we pass to a brief but necessary statement of the salient facts.

Initiation of New Rate Level by Interstate Commerce Commission.

The railroads emerged from Federal control March 1, 1920, confronted with an aggregate net deficit from operations of $12,000,000 for the preceding month of February, and with a ratio of return amounting to 2.8% for 1919 and 3.6% for 1918 upon the aggregate value of their property as represented by their property investment accounts as reported to the Commission. (This property investment account was, according to the interlocutory valuation by the Commission hereinafter referred to found to be only five per cent above the correct amount.) The grossly inadequate rates productive of that result, both interstate and intrastate, were continued in effect by Section 208 of the Transportation Act for six months, unless otherwise approved by the Commission. During this period

a guaranty of the standard rental was available to the carriers under section 209 of the Act.

To reduce the Government's heavy loss under this guaranty and to reestablish a compensatory rate level to sustain the carriers, depleted and undermaintained during Federal control, disorganized and handicapped by the subnormal rate levels of Federal control, it was obviously the duty of the Commission, to the extent of its power, to produce a radical increase in revenue under the constructive policy of the Transportation Act.

Accordingly, in pursuance of Section 422 of the Transportation Act, the Interstate Commerce Commission promptly recognized that the responsibility for initiating an increase in rates was obligatory and invited the carriers to crystalize the proceeding around formal applications for a general increase, which were filed before the Commission in April and May, 1920. See 34th Annual Report, Interstate Commerce Commission, December 1, 1920, page 6, and in re *Increased Rates, 1920*, 58 I. C. C. 220.

The Commission had, pursuant to the Act, tentatively announced that the carriers of the country would be considered in three groups, conforming generally to the three major rate classification territories, viz: Eastern, Southern, and Western. (Report, *supra*, p. 6.)

Prolonged hearings were held by the Commission and in harmony with the provisions of paragraph (3) of Section 13 of the Commerce Act, as inserted by Section 416 of the Transportation Act, representatives of the State Commissions were invited to sit with the Commission throughout the hearings and argument and in all conferences, (*ib*), also 58 I. C. C., 220.

It was contemplated by the Transportation Act that state-made rates would under the various provisions of the Act be *in issue*, particularly "with respect to the relationship between rate structures." This expressly appears from Sections 416 (3) and necessarily from Section 422 of the Transportation Act, and from the inherent nature of the proceedings under that section. For this reason especial significance is to be attached to the fact that representatives of the State Commissions were

invited to sit and did sit throughout the hearings, arguments and conferences in the main hearing under Section 422 reported in 58 I. C. C. 220.

This hearing resulted in the establishment of four carrier groups instead of three, viz: Eastern, Southern, Western, Mountain-Pacific, 58 I. C. C. 225 (226), and in the ascertainment of an aggregate interlocutory valuation for the purposes of the rate adjustment then before the Commission of $18,900,000,000.

In arriving at its decision as to the rate advance necessary the Commission analyzed the net railway operating income of the various groups, the aggregate revenue ton miles and other factors pertinent to the analysis of the financial requirements of the carriers and to the question of an adequate return upon the aggregate investment employed in the service of transportation without, any effort to segregate intrastate data from interstate data. In its investigation the Commission necessarily made use of the reports made by the various carriers to the Commission under Section 20 of the Interstate Commerce Act which, of course, includes in solido interstate and intrastate results. It should be recalled at this point that in sustaining the constitutional power of Congress to adopt Section 20, the Supreme Court in *I. C. C. v. Goodrich Transit Company*, 224 U. S. 194 (213), expresses doubt whether it would be practicable to separate items of expense entailed in the carriage of interstate and intrastate commodities upon a common instrumentality of transportation. The Transportation Act, as will appear, gives effect to that common sense conclusion.

Form of Order in 58 I. C. C. 220.

There is discernible in the opinion and order handed down by the Commission in *Increased Rates, 1920*, 58 I. C. C. 220, no definite intention to limit the percentage increase authorized to interstate charges. The hearing was under Section 422 of the Transportation Act and not under Section 15 of the Commerce Act. The States were represented both upon the bench with the Interstate Commerce Commission and by the representatives

of their railroad commissions or the representatives of their organization. The State of Wisconsin was formally and directly represented by one of the appellants in this cause. 58 I. C. C. 220.

As intrastate rates in effect March 1, 1920, were continued in effect by Section 208 of the Transportation Act to September 1, 1920, unless changed or approved by State or Interstate Commission, the Commission might conclusively have determined that a percentage increase in interstate rates would impair the relationship between the presumptively common level existing March 1, 1920, and then remaining unchanged under the provisions of Section 208, in such wise as to justify the Commission in expressly ordering the same ratio of increase in both rate structures, in the exertion of its plenary power and duty to produce the aggregate net railway operating income required by Section 422.

That is the result contemplated by Section 422. It is wholly unnecessary to work out that result through the adjustment, first, of the interstate rate level, to be followed by a separate hearing for the subsequent adjustment of the intrastate rate level in order to avoid undue burden.

We by no means suggest that the order in *Increased Rates*, 1920, 58 I. C. C. 220, did not accomplish that result and afford direct and competent authority to the carriers to extend the increases to their intrastate rate fabrics. Our view is that the order was effective to that end. Whether it was so effective or not is not material to the result on this appeal, for any deficiency in the original order was adequately supplied by the subsequent hearing, whether regarded as supplementary to the original order or as an independent proceeding instituted by the carrier or by the Commission under Section 416 (3).

Procedure Observed in this Case.

The procedure actually observed suggests that in going forward with the new basis of regulation arising out of the Transportation Act, both the carriers and the Commission have properly evidenced a disposition not to press the Federal

authority beyond its necessary implications. In that spirit the carriers presented to all State Commissions throughout the country applications similar to those filed with the Interstate Commerce Commission, and the records of the hearings and arguments before the Commission in the main case were made available to the State commissions, with the following results as stated on page 9 of the 34th Annual Report of the Interstate Commerce Commission (December 1, 1920).

Twenty-four (24) States approved in full the increases in freight traffic as per original order of Interstate Commerce Commission and twenty-three (23) approved in full the passenger increases. Some States denied all relief, others yielded in part to the conclusion of the Interstate Commerce Commission, and the commissions of thirteen (13) States were prevented from taking appropriate action by statutory provisions. The carriers thereupon filed with the Interstate Commerce Commission formal petitions alleging that the failure to authorize the same measure of increase as approved by the Federal Commission results in undue preference in favor of intrastate traffic (Report, *supra*, page 9).

This representative case is accordingly before the Supreme Court not only upon an order entered pursuant to Section 422 and supplemented by a definitive order as to the Wisconsin rates of the appellee, but upon an affirmative finding by the Interstate Commerce Commission of discrimination well within the previous adjudications of the Supreme Court construing the Interstate Commerce Act, bearing in mind, of course, that by the amendment to the Act the carriers themselves have been expressly authorized to institute proceedings before the Commission bringing in issue any rate or regulation made or imposed by authority of any State (Section 415 (3)) and that Section 416 (4) prohibits unjust discrimination against interstate or foreign commerce, "the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Thus, the order involved is affirmatively within the jurisdiction of the Commission not only upon a finding of discrimination but also upon the finding of the Commission that the intra-

state rate adjustment involved is essential to produce the ratio of return made mandatory by Section 422 of the Act, assuming the constitutional validity of such action.

Phase Covered by This Brief.

This brief is concerned mainly with the changes in rate mechanism worked by Section 422 and with its economic and constitutional theory. References will be made to the theory of the Interstate Commerce Act before the amendment of February 28, 1920 (Transportation Act), only for the purpose of orderly transition to the present subject. We are constrained to interpose this memorandum by the conviction that if the power of Congress to assure constructive results in the regulation of the common instrumentalities of interstate and intrastate transportation are to break down under the present attack, there is no hope for the survival of the national transportation machine under the accepted American program of regulated private ownership and operation.

The Transportation Act marks the effort to extend the regulation begun in 1887 to its logical results, carrying a corresponding obligation to sustain the agency thus subjected to complete governmental control. If the present attack upon the Transportation Act should be successful, railway disintegration in America, which was threatened prior to the war and is now ominous on account of economic conditions, would be an accomplished result.

It is a matter of contemporary history and common knowledge that the rate increases authorized in re *Increased Rates, 1920*, 58 I. C. C. 220, estimated by the Commission as adequate to produce a ratio of 6% on the temporary valuation, produced a return of 3.03% per annum for the four months ended December 31, 1920, at the rate of .07% per annum for the month of December, 1920, and barely produced operating expenses in January, 1921. The refusal by State authorities to authorize increased rates under these circumstances means destruction and disintegration just as the same opposition to an increase of the grossly inadequate rate levels of the Director General meant

nearly a billion dollar deficit during Federal control and disorganized earning power upon the relinquishment of Federal control.

As asserted in *Missouri v. Holland*, 252 U. S. 416, speaking of the treaty-making power reserved to the National Government:

> "The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. . . . We must consider what this country has become in deciding what that amendment has reserved. . . . It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act."

These conditions have brought about a crisis in national transportation which can not overcome further serious obstacles of the character giving rise to this record. If the commerce clause is helpless to sustain the national agencies against the inevitable scramble for local advantage which must arise out of a multiple control of an essentially integral organism, the purpose of its framers has failed.

Regulation of Relationship Between Intrastate and Interstate Rate Structures, Before Transportation Act.

Since the decisions in the *Shreveport Case* (*Houston East & West Texas Ry. Co. v. U. S.*), 234 U. S. 342, *American Express Co. v. Caldwell*, 244 U. S. 617, and *Ill. Cent. R. R. Co. v. Public Utilities Comm.*, 245 U. S. 493, it is no longer open to doubt that Congress has ample power under the commerce clause of the Constitution to prevent the common instrumentalities of interstate and intrastate commerce from being used in their intrastate operations in such manner as to affect injuriously traffic which is interstate, and that where unjust discrimination against interstate commerce arises out of the relation of intrastate to interstate rates, the power conferred by the commerce clause may be exerted to remove the discrimination, and this whether the intrastate rates are maintained under a local statute or

by the voluntary act of the carrier. It was specifically asserted in the definitive restatement of the principle found in *Ill. Cent. R. R. Co. v. Public Utilities Comm.*, 245 U. S. 493 (506), that in correcting such discrimination Congress is not restricted to an adjustment or reduction of the interstate rates, but may prescribe a reasonable standard to which the rates shall conform and require the carrier to adjust the intrastate rates in such a way as to remove the discrimination:

> "For where the interstate and intrastate transactions of carriers are so related that effective regulation of one involves control of the other, it is Congress and not the State that is entitled to prescribe the dominant rule."

These conclusions asserted by the Supreme Court, supplementing the decision in the *Minnesota Rate Cases*, 230 U. S. 352 leave no doubt of the power of Congress to take hold of the intrastate rates of interstate carriers whenever by reason of their common use as instrumentalities of interstate and intrastate commerce it shall appear to Congress that general rate adjustments involving and requiring the contemporaneous adjustment of both interstate and intrastate rate levels are essential in order adequately to produce the minimum aggregate net railway operating income which Congress or its agency has found necessary in order for the group of systems affected to survive.

The sole question for discussion is whether the Transportation Act, 1920, has authorized the Commission to make a horizontal order adjusting the level of rates within a given State to conform to like adjustments of the interstate rate level and applicable to all carriers within the rate group defined by the Commission pursuant to Section 422 (2) of the Transportation Act; and whether the commerce clause of the Constitution empowers Congress to adopt the particular basis and procedure provided for in the Act.

As stated in the opinion in *Houston v. Moore*, 5 Wheat. 1.

> "I am altogether incapable of comprehending how two distinct wills can at the same time be exercised in

relation to the same subject, to be effectual, and at the same time compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must in the nature of things oppose each other so far as they do differ."

Normal Local Authority not Displaced.

It can not be too definitely borne in mind that the Transportation Act evidences no purpose on the part of Congress to take over or displace the State's normal authority over the adjustment of intrastate rates.

Preserving and enlarging the machinery for the application of the principle of the *Shreveport Case* through the provisions of Section 416, this Act, by the terms of Section 422 further advances Federal control by reposing authority in the Commission, directly under Section 422 and in any event in combination with Section 416, to deal with State rate structures or rate levels to such extent as the Commission may find necessary in order to produce the rate of return contemplated by Section 422. The adjustment or readjustment of intrastate rates in detail, following any general advance or decrease of this character, is left with the States, which must, of course, substantially accommodate their action to the outline and the result contemplated or prescribed by any order of the Interstate Commrce Commission in the premises and subject to any express orders by the Federal Commission having a rational bearing on the intrastate and interstate rate relationship. Of course, the Commission, in producing the result made mandatory by Section 422 may, in accordance with its findings, adjust particular groups or classes of rates by bringing up low spots, ironing out peaks, or otherwise as the facts and requirements of the respective carriers may warrant or require. It is impossible to gain a conception of the purpose and sound economic and constitutional theory of Section 422 and its reconstruction of rate making in the United States without considering the section in its entirety.

Our insistence upon this record is, that under the Interstate Commerce Act as amended by Section 416 of the Transportation Act, 1920, the Interstate Commerce Commission has properly exerted its jurisdiction to relieve an unjust discrimination against interstate commerce arising out of the relation of intrastate to interstate rates, and (2) that under Section 422 of the Transportation Act, 1920, the Commission appropriately exerted its jurisdiction, the exercise of which is by the Act made mandatory, to initiate and put into effect a horizontal adjustment of existing rate levels, both interstate and intrastate, without necessary reference to the question of discrimination, in order to produce the minimum living return required by Congress for the instrumentalities of interstate commerce within the particular groups involved. The fact that the rate level authorized by the Commission has not produced the result anticipated by the ordermerely charges the Commission with a revision of its action at the appropriate time.

Practical Considerations Confronting Congress.

It sufficiently appears from this record and as a matter of contemporary history that at the time of the order of the Interstate Commerce Commission in *Increased Rates, 1920,* 58 I. C. C. 220 the transportation systems of the United States had recently emerged from Federal control and that the necessity for general rate advances was imperative if the rail systems of the United States were to survive the guaranty period. The impossibility of delaying the process of rate adjustment in order to deal with the subject in connection with the innumerable individual rates obtaining upon the different railroads, interstate and intrastate, and under the unworkable procedure of the past was manifest.

A horizontal increase could alone reach the necessity. Differentials and readjustments could be left to be worked out by the Interstate Commerce Commission as to interstate rates and by the States—within the general level and consistently with the controlling direction of the Interstate Commerce Commission as to intrastate rates.

It is the purpose of this brief to demonstrate (1) that the fundamental purpose of the Transportation Act was to authorize the Interstate Commerce Commission to make horizontal rate adjustments of this character, affecting both interstate and—immediately or through proceedings under Section 416—intrastate rates, as the Commission might order, and applicable to interstate railroads as a whole throughout continental United States or to the interstate railroads divided into groups as might be determined by the Commission, and (2) that this power was sufficiently conferred upon the Commission and appropriately exerted by it in the order in *Increased Rates, 1290*, 58 I. C. C. 220 in such wise that the supplemental hearing in, the matter of the Wisconsin rates, here immediately involved, was necessary only as a matter of comity or by way of enlargement or definition of the original order.

In short, it is our insistence that the Transportation Act, 1920, *ex proprio vigore*, conferred the power of initiative upon the Interstate Commerce Commission in respect both of interstate and intrastate rate levels (as it might determine) in connection with the Commission's continuing duty under that act to adjust and readjust rates from time to time in such wise as to produce a reasonable rate of return to the group from all rates (interstate and intrastate), to be ascertained and declared by the Commission after the expiration of two years, during which the temporary return of 5½%-6% fixed by the Transportation Act was to prevail.

It will readily occur that a rate of return of only 5½%-6% on the aggregate value of property in the group might be found inadequate if attacked and therefore beyond the restrictive power of Congress. If so, the State of Wisconsin could not raise the question. After two years the Commission is required to ascertain and declare the rate of return. During the two-year period of transition from Federal control it is to be doubted

if a group return exceeding 6% was practicable. As a comprehensive effort to break down the Transportation Act on part of the appellants and their associated amici curiae is noticeable, it seems desirable to refer briefly to the sound reasons actuating the adoption of certain features of this act which, observed merely in passing, might seem to call for explanation One of these features is the apparently inadequate temporary group return of 5½%-6%.

Of course, the purpose of Congress in defining the standard in terms of aggregate or group return was to use a readily accessible measure, applied to such groups as the Commission might find convenient. The standard of return could not be applied to the individual carriers, because of their competitive and diverse situation. Where the rate structure is adjusted so as to be sufficient to produce an aggregate net return upon the aggregate property value, it is obvious that the different roads in the group would apply these rates (largely competitive and therefore identical) with varying results according to their relative situation and earning power. Thus the rate level in effect throughout the country during the pre-war test period produced an aggregate net railway operating revenue for all Class I railroads equal to 5.22% upon their investment accounts, the various railroads in this national group earning varying returns, from less than 1% to more than 10%. The thought of Congress in enjoining this standard is that it afforded a stabilized rate of return to the group and left the railroads composing the group to compete for their return according to the best of their ability. If the standard return for the group was fair, it would be practically certain that the failure of any carrier to earn his share would be due to competitive disadvantages with which the Constitution is not concerned.

To justify the Commission—and Congress—in producing a group return sufficient to enable the less prosperous carriers to survive and discharge their duty to furnish adequate service it was recognized that excessive and unnecessary revenue would be produced for certain carriers in the group. This *casus* was dealt with through the regulation of excess earnings—a much maligned and misunderstood provision, which is sound

in theory and will be referred to at a later point in this brief. The immediate question is why the low ratio of aggregate return fixed by Congress for the first two years (thereafter to be fixed by the Commission)?

The Railroad Administration adopted the policy of holding down rates during Federal control and paying resulting deficits out of the Treasury, thus avoiding reaction from the public. Higher rates were necessary to place Federal transportation on a compensatory basis and, from the standpoint of the carriers and their ultimate earning power the policy was destructive. Business could have adjusted itself to adequate rates during Federal control. When the roads were returned they were saddled with an inadequate rate structure and declining business.

This policy resulted in payments by the Railroad Administration for rental and operations of over $715,000,000 more than the operating revenues. (Report to the President. Director-General of Railroads, 1920.)

The ratio of aggregate net railway operating income to aggregate property investment accounts of all carriers during the pre-war test period (three years ended June 30, 1917) was 5.22%; and for the years 1908–1917 was:

	Per cent.		Per cent.
Dec. 31, 1917	5.31	1912	4.69
1916	6.17	1911	4.92
June 30, 1915	4.17	1910	5.68
1914	4.12	1909	5.38
1913	5.01	1908	4.89

(House Report No. 456, 66th Congress, 1st session, page 44.)

In view of the proposition that affirmative regulation intended to assure the carriers against the destructive rate levels therteofore prevailing must be practicable and adapted to existing conditions, the 5½%-6% level proposed during the transition period while low was not destructive or confiscatory. It must be remembered that general relief had been repeatedly denied by the Commission, in whole or in part, when the rate level was still lower, such as 4.69% (1912), 5.01 (1913), 4.12 (1914), 4.17 (1915); and that on March 1, 1920, when the roads

were released from Federal control they had earned under the rates enforced by the Railroad Administration approximately 3.60% on their aggregate property accounts during 1918, 2.8% during 1919, and an actual operating deficit of over $12,000,000 for the month immediately preceding the restoration of the properties to their owners. It is obvious that under these conditions, and because of the policy of the Director-General not to adjust the rate level to a compensatory basis Congress could not require the Commission to increase the rates to that basis by saltatory action that would react destructively upon the traffic of a declining market. That is the grave situation now even more seriously confronting the railroads.

Congress Did Not Intend That Entire Burden of the 5½%-6% Adjustment Should Fall on Interstate Rates.

Under the Transportation Act "net railway operating income" is defined as meaning railway operating income, including debits and credits arising from equipment and joint facility rents. Under the accounting regulations of the Commission these accounts of course include, without identification, the results of intrastate operations; and in all of the reports and in the exposition of the bill during its passage by its managers in the Senate and House reference was repeatedly made to the basic consideration given by the statute to net railway operating income, in the sense above defined, as the decisive factor in adjusting rate levels under the act. It would be idle to suggest that in accommodating the rate level to the stipulated group return, in terms of aggregate net railway operating income, it was the intention of Congress that adjustments of rates upward by the Commission should fall solely on interstate rates. Congress had before it elaborate information showing that the rate level then existing produced a ratio of return of 2%-3%. It necessarily understood that an adjustment of rates so as to produce a 6% level meant radical revision upwards ("about $50,000,000 more than the basis of the test period, as defined in the Federal Control Act"—Senator Cum-

mins, Cong. Rec., Feb. 23, 1920, p. 3499). Applying these figures we find that the net railway operating income of 585 carriers for the test period as certified by the Commission pursuant to the Federal Control Act was $945,279,920.51 (34th Annual Report, I. C. C., p. 71). About $1,000,000,000 was required to produce 6%. The net railway operating income of the steam roads, including switching and terminal companies for 1919 was only $509,601,118 (Ib. p. 100). There was, accordingly, approximately $500,000,000 in net operating income required on the basis of 1919 operations to bring the level of return up to 6%. It is not conceivable that Congress intended that this burden should be borne wholly by interstate traffic. Nor is it conceivable that Congress should have admonished the Commission to establish a level of rates in order to produce a given estimated return only to have the calculation destroyed by the uncontrolled and discordant action of the many States concerned.

The standard of measurement (net railway operating income), the basis of value (the fair value of all the property employed in the service of transportation) and the necessary character of the calculation compel the conclusion that the Commission was expected to deal with intrastate revenue and therefore intrastate rates.

We reserve to a more appropriate place in this brief, following a discussion of the undoubted power of Congress, a statement of the rationale of Section 422 and the entire soundness of its constitutional theory.

Outworn Theories of Rate Making and the Transportation Act.

The appeal in this cause challenges the power of Congress to consider railway transportation in its national aspects or to authorize the Interstate Commerce Commission to adjust rates in the light of their aggregate result upon the systems of transportation within groups or throughout the nation.

If the contention of appellants are sustained, the transportation problem of the United States would be crystallized in its second—and destructive—phase—the three phases of American transportation being thus stated:

1. The period of promotion and absence of regulation, extending from the beginning of railway construction in America to the era of regulation.

2. The period of individual rate regulation and restriction, beginning with the adoption of the various commerce acts by Congress and by the States without adequate consideration for the result of rates in the aggregate and with no consideration for the relationship of the several railroads to the transportation system of the United States as a whole.

3. The third phase begins with the Transportation Act, 1920, by which the processes of regulation involved in the second phase are carried to their logical completion, accompanied by regulatory provisions of the most far-reaching character. These provisions for the first time accompany the restrictive action proposed with parallel provisions placing rate regulation upon a permanent and constructive basis founded primarily upon the fact that the railways systems of the United States must be regarded in their essential unity and that regulation of commerce may destroy commerce unless the system is tested by the result in terms of revenue as well as by the isolated analysis of individual rates.

It is obvious that if the rate structure is to be responsive to results in the aggregate, as contemplated by the Transportation Act, the system of regulation must at some point in the process deal with the level of intrastate rates.

The Interstate Commission must of necessity be able to fix the general relationship between the interstate and intrastate rate levels in order to produce the aggregate net railway operating income contemplated by the statute without undue burden upon either class of service.

The net income of each unit of the transportation system, and consequently its ability to survive and function, is made up of the aggregate earnings of the carrier from its intrastate and interstate operations. These are essentially impossible of segregation from the standpoint of current necessary adjustments of the rate level. For this reason the immunity from regulation under the commerce clause claimed for intrastate rates, as advanced by appellants, amounts to nothing less than

the proposition that the commerce clause confers upon Congress no power to assure or provide for the survival of the agencies of interstate transportation through the practical and timely adjustment of the rate structures to changing conditions.

RATE REGULATION UNDER THE INTERSTATE COMMERCE ACT BEFORE THE ADOPTION OF THE TRANSPORTATION ACT, 1920.

The chief purpose of the act to regulate commerce and its amendments, as repeatedly declared by the Supreme Court of the United States, was to prevent unjust preferences and undue discriminations and to secure uniformity of rates and service.

United States of America v. Pacific & Arctic Railway & Navigation Co. et als., 228 U. S. 87;
United States of America v. Union Stock Yard & Transit Company of Chicago, 226 U. S. 286;
United States et als. v. The Baltimore & Ohio Railroad Co., 225 U. S. 306;
Procter & Gamble Co. v. United States et als., 225 U. S., 282;
Robinson v. Baltimore & Ohio Railroad Co., 222 U. S., 506;
Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426;
Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479;
Denver & R. G. R. Co. v. Baer Bros. Merc. Co., 187 U. S. 485.

The effect of this restrictive and limited policy upon the revenue of interstate carriers and the inadequate remedy afforded by this system to the carriers when, by reason of increased expenditures or diminished business, their revenues have fallen or declined below a datum line essential to the continued survival of the transportation machine, will be illustrated by a brief reference to the *General Advance Rate Cases* tried before the Interstate Commerce Commission under the Interstate Commerce Act. It is essential at this point to recall the fact, as stated by the Circuit Court of Appeals in *Central R. Co. of N. J. v. Anchor Line*, 219 Fed. 716, that

> "The Interstate Commerce Law is not intended for the benefit of carriers, but to protect passengers, shippers, and consignees against unreasonable rates of passage money and of freight and against unfair discrimination between passengers, shippers, and consignees."

The Interstate Commerce Law was restrictive and repressive. It was regulation downwards, negative rather than constructive. It was not intended to take care of that general interest of the public which is subserved by adequate revenue for the railroads and contained no affirmative provision to sustain the revenue of interstate carriers. The Interstate Commerce Act dealt primarily with individual shippers and with individual rates and was essentially indifferent to the result in terms of net operating income to the railroad as well as to the indirect bearing which inadequate revenue might have upon the transportation systems.

The derivative power of regulation, asserted by the States in virtue of their right to prevent common carriers from violating a general duty to charge no more than a reasonable rate for each individual service rendered, was inherently restricted to a like molecular view of the matter. Thus, rate regulation prior to the Transportation Act was, from a practical standpoint, reduced to a consideration of the reasonableness of individual rates—a process which is so obviously defective from purely mechanical considerations as to require no demonstration in the melancholy results which attended it.

The efforts of the carriers to apportion value and operating expenses as between interstate and intrastate operations have been repeated, costly and fruitless. The burden of proof in respect of the use-units adverted to in the *Minnesota Rate Case* for the distribution of property and the necessity for elaborate and expensive—if not equally impossible—test period accounts for the allocation of expenses as between freight, passenger, interstate and intrastate, deprived the transportation systems of any practicable remedy, notwithstanding the practical evidence of inadequate revenue reflected by the aggregate net operating incomes of the carriers.

These difficulties were urged upon Congress in the hearings preliminary to the adoption of the Interstate Commerce Act (Hearings, 1919, Committee on Interstate and Foreign Commerce, House of Rep., "Return of Railroads to Private Ownership," Vol. I, p. 1034, 1650, 2834, 957, 3001-3009, etc.) The present chairman of the Commission explained the application of a standard return fixed for a group of carriers (ib. p. 2883) based upon aggregate return, and note the following colloquy (p. 2886):

> MR. SANDERS of Indiana. . . . Then the third plan is what is known as the Warfield plan, which, in general, is the plan to have a definite rule . . . of rate making for certain rate making groups, and have the standard of a fair, aggregate return on that group. Now, of the three plans, which one do you think is best?
>
> MR. CLARK. Well, having in mind the experience of the last two or three years, and the conditions that exist to-day, in choosing between the three plans, personally I would choose the third that you have mentioned. . . .

It is well known that the House Bill (H. R. 10453), reported out by the House Committee, rejected this program and adhered to the old basis of rate making based on the individual rate and service. (66th Cong. 1st Session, Report No. 456, House of Representatives, to accompany H. R. 10453, p. 8-10), and that the Senate Bill (S. 3288) accepted it (66th Cong. 1st Session, Senate Report No. 304 to accompany S. 3288, p. 10-13), the Committee saying (p. 12):

> "Heretofore the regulation of transportation has been regarded merely as a restriction imposed upon particular carriers. For the first time it is proposed to look upon transportation as a subject of national concern and from a national standpoint. It is the duty of the Government so to exercise its power of regulating commerce among the States and with foreign nations that all parts of a common country shall enjoy adequate transportation facilities at the lowest cost consistent with fairness to the capital invested and to the men who manage and operate these facilities. The commerce of one community, in these days, is deeply involved in the commerce of every community in the land. . . ."

The Senate view prevailed in conference (Statement of Mr. Cummins in charge of the conference bill in the Senate Feb. 23, 1920, Cong. Rec. p. 3499; and of Mr. Esch, occupying a similar relation to the conference bill in the House, Cong. Rec. Feb. 28, 1920, p. 3912), and the conference bill was adopted.

Thus the Transportation Act deliberately worked a radical change in the theory of rate making in respect of interstate railroads; and this appeal challenges the power of Congress to give effect to the new theory, or, indeed, to consider railway transportation in its national aspect or the interstate railway systems in their organic relation to national transportation.

The Commerce Clause and State Regulation.

In the *Minnesota Rate Cases*, 230 U. S. 352, there was directly presented the question whether the mere fact that a schedule of State rates was lower than the scheme or level of interstate rates most nearly comparable was of itself such a direct burden upon interstate commerce as to authorize the correction of the State rate level without reference to any other fact. The question of the power of Congress to deal with a situation of this kind and whether the Commerce Act, as it then stood, did in fact deal with the situation was directly presented and formally stated and determined. After quoting from *Gibbons v. Ogden*, 9 Wheat. 1, 196, and commenting on the disastrous experience under the confederation when the States vied in discriminatory measures against each other, and asserting that in order to end these evils the grant in the Constitution conferred upon Congress an authority at all times adequate to secure freedom of interstate commercial intercourse and to provide effective regulation of that intercourse as the national interest may determine, the Court quoted the expression of Chief Justice Marshall to the effect that:

> "The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation and to those internal concerns which affect the states generally, but not to those which are completely within the particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government."

Further quoting the observation of Chief Justice Marshall that "the completely internal commerce of a State, then, may be considered as reserved for the state itself," the Court said:

> "This reservation to the States manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. *The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on;* and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven, therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. *McCulloch v. Maryland*, 4 Wheat, 316, 405, 426; *The Daniel Ball*, 10 Wall. 557, 565; *Smith v. Alabama*, 124 U. S. 465, 473; *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618, 619; *Southern Railway Co. v. United States*, 222 U. S. 20, 26, 27; *Mondou v. N. Y. N. H. & H. R. R. Co.*, 223 U. S. 1, 47, 54, 55."

Pointing out the wide jurisdiction of the State over local matters incidentally affecting interstate commerce, the Court observed that when the legislation of the State is limited to internal commerce to such degree that it does not include even incidentally the subjects of interstate commerce, it is not rendered invalid because it may effect the latter commerce indirectly, and again quoted from *Gibbons v. Ogden* to the effect that, no direct general power over the internal commerce of the State, inspection laws, quarantine laws, etc., having been granted to Congress, they remain subject to state legislation and that:

> "If this legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose or is clearly incidental to some power which is expressly given."

The Court in the *Minnesota Rate Case*, recognizing that Congress in pursuance of national necessity might in appropriate cases deal with these matters of primarily internal significance "to secure the complete government of interstate commerce" asserted that the state power nevertheless continues until Congress does act and by its valid interposition limits the exercise of the local authority, and followed this assertion of the general principle with the direct conclusion that "these principles apply to the authority of the State to prescribe reasonable maximum rates for intrastate transportation."

The final and definitive attitude of the Court upon the proposition was stated as follows:

> "If this authority of the State be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant Federal power, that is, one which has not been exerted, but can only be found in the actual exercise of Federal control in such measure as to exclude this action by the State which otherwise would clearly be within its province."

The Court saved the question whether the proviso of Section 1, to the effect that the provisions of the Commerce Act shall not apply to the transportation of passengers or traffic, wholly within one State, was subject to the provisions of Section 3, prohibiting unreasonable preferences as well when arising from an intrastate rate as when due to interstate rates exclusively. The Court said:

> "If it be assumed that the statute could be so construed, and it is not now necessary to decide the point . . . the question whether the carrier in such a case was giving an undue or unreasonable advantage to one locality as against another . . . would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts."

The question thus left open in the *Minnesota Rate Cases* was, of course, decisively settled in the *Shreveport Case* and in the group of cases following it and the field of Federal control thus established has been confirmed and enlarged by Sections 416 and 422 of the Transportation Act.

The Court stated its conclusion upon the question then before it in these words:

> "The question we have now before us, essentially is whether after the passage of the Interstate Commerce Act, and its amendment, the State continued to possess the state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic. That, as it plainly appears, was the nature of the action taken by Minnesota, and the attack, however, phrased, upon the rates here involved as an interference with interstate commerce, is in substance a denial of that authority.
>
> "Having regard to the terms of the Federal statute, the familiar range of state action at the time it was enacted, the continued exercise of State authority in the same manner and to the same extent after its enactment, and the decisions of this court recognizing and upholding this authority, we find no foundation for the proposition that the Act to Regulate Commerce contemplated interference therewith."

That this conclusion was not intended to mark out a limitation upon the power of Congress and was pertinent merely to the Commerce Act as it then stood, is sufficiently apparent from this significant expression, italics supplied:

> "To suppose, however, from a review of these decisions, that the exercise of this acknowledged power of the State, may be permitted to create an irreconcilable conflict with the authority of the Nation, *or that through an equipoise of powers an effective control of interstate commerce is rendered impossible*, is to overlook the dominant operation of the Constitution which, creating a Nation, equipped it with an authority, supreme and plenary, to control National commerce and to prevent that control, exercised in the widom of Congress, from being obstructed or destroyed by any opposing action. But, as we said at the outset, our

system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. It thus clearly appears that, under the established principles governing state action, the State of Minnesota did not transcend the limits of its authority in prescribing the rates here involved, assuming them to be reasonable intrastate rates. It exercised an authority appropriate to its territorial jurisdiction *and not opposed to any action thus far taken by Congress.*"

Answering the contention of the railroads based upon the interblending of operations under the conduct of interstate and local business and recognizing the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate values and expenses, the Court made the following comment:

"The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right-of-way, terminals, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year and, indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic, can be made to-day, which will hold to-morrow; that terminals, facilities and connections in one State aid the carrier's entire business and are an element of value with respect to the whole property and the business in other States; that securities are issued against the entire line of the carrier and cannot be divided by States; that tariffs should be made with a view to all the traffic of the road and should be fair as between through and short-haul business; and that, in substance, no regulation of rates can be just, which does not take into consideration the whole field of the carrier's operations, irrespective of State lines. The force of these contentions is emphasized in these cases, and in others of like nature, by the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom.

> *"But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments, the measure of the regulation it should supply.* It is the function of this Court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power."

This decision, carried forward and supplemented by the decisions in the group of cases following the *Shreveport Case* (*Houston East & West Texas Ry. Co. v. U. S.*, 234 U. S. 342; *American Exp. Co. v. Caldwell*, 244 U. S. 617 and *I. C. R. R. Co. v. Public Utilities Commission*, 245 U. S. 493) leaves a single question of constitutional authority open for discussion so far as the question of the effect of the rate making provisions of Section 422 on intrastate rates is concerned. That is the question whether the use of the net railway operating income accounts resulting from interstate and intrastate operations reflected in solido in the carriers general accounts, and adopted by Section 422 as the datum line for rate-making, is reasonably related to the regulation of the railroads, singly or in groups, as instrumentalities of interstate commerce under practical every day necessities of regulation and rate adjustment. If so, the Interstate Commerce Commission must give consideration to intrastate rates as a factor in making up the equation for a reasonable group return under the theory of Section 422 of the Transportation Act. It is clear that the relationship exists, that the necessity is a practical one and that there can be no "complete government of interstate commerce" without such consideration.

It is impossible for the Commission to forecast the result of operations within any group in terms of net railway operating income without involving the Commission in a finding or assumption as to intrastate rates. The Commission can make good its assumption or findings in respect of intrastate rates only by controlling the results produced by such rates—by controlling the intrastate rate level. It follows that denial of the power to exert this control is to deny to the Commission the power to establish and maintain rate levels that will sustain the instrumentalities of interstate transportation—a proposition that is wholly untenable.

Analogous Extensions of Federal Control

The penal provisions of the safety appliance act was constitutionally applied to cars, engaged exclusively in intrastate commerce because of the "close or direct relation or connection between the two classes of traffic, when moving over the same railroad." *Southern Ry. v. U. S.*, 222 U. S. 20.

The reasoning of the Court in sustaining that statute is wholly pertinent to this question and demonstrates the interdependence between intrastate and interstate traffic in their physical aspects. The remedial effect of the Safety Appliance Act extends to servants engaged solely in intrastate commerce. *Texas & Pac. Ry. v. Rigsby*, 241 U. S. 33.

The Act of June 29, 1906 authorizing the Interstate Commerce Commission to prescribe a uniform system of accounting and bookkeeping for interstate carriers permits the Commission to regulate the entire system of bookkeeping of such carriers, including intrastate as well as interstate items,

I. C. C. v. Goodrich Transit Co., 224 U. S. 194;
Kansas City South R. Co. v. U. S., 231 U. S. 423.

In the *Goodrich Transit Case*, the court pointed out the fact that it was impracticable for the carriers to separate the accounts

and reports in respect of two kinds of traffic conducted through a common agency, asking:

> "How would it be practicable to separate the items of expenses entailed in the carriage of these various classes?" (*ib* p. 213).

Congress may protect a navigable stream by forbidding interference with a non-navigable tributary, *United States v. Rio Grande &c. Co.*, 174 U. S. 690, 699, 709.

The Adamson Act, 39 Stat. 721, c. 436, sustained in *Wilson v. New*, 243 U. S. 332, relates, with exceptions not important here, to all employees—

> "who are now or may hereafter be employed by any common carrier by railroad . . . which is subject to the provisions of the Act of February 4, 1887, entitled 'An Act to Regulate Commerce,' as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads."

It is to be observed that the Act applies to all trainmen in the employ of interstate carriers, whether the employees in question are engaged in interstate commerce or not.

The opinion in that case puts aside any possibility of doubt upon the question whether Congress had the right to establish permanently and horizontally the 8-hour standard of service, as being so clearly sustained as to render the subject not disputable, citing *B. & O. R. R. Co. v. Interstate Com. Comm.*, 221 U. S., 612, and *M. K. & T. Ry. Co. v. U. S.*, 231 U. S. 112.

Observing that it is no longer subject to dispute that common carriers by rail in interstate commerce are within the legislative power of Congress to regulate commerce, the court asserted that "where a particular subject is within such authority the extent of regulation depends on the nature and character of the subject and what is appropriate to its regulation," citing

McCulloch v. Maryland, 4 Wheat. 316, 421-423, etc. The Court stated that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to apply a remedy for a situation which threated the interruption of interstate commerce.

> "This must be unless it can be said that the right to so regulate as to save and protect the public interest did not apply to a case where the destruction of the public right was imminent. . . . in other words that the existence of the public right and the public power to preserve it was wholly under the control of the private right to establish a standard by agreement."

The Chief Justice further stated that—

> "there would seem to be no ground for disputing the power which was exercised . . . that is, to exert the legislative will for the purpose of settling the dispute and bind both parties to the duty of acceptance and compliance to the end that no individual dispute or difference might bring ruin to the vast interests concerned in the movement of interstate commerce, for the express purpose of protecting and preserving which the plenary legislative authority granted to Congress was reposed."

The following question was propounded:

> "What would be the value of the right to a reasonable rate if all movement in interstate commerce could be stopped as a result of a mere dispute between the parties or their failure to exert a primary private right concerning a matter of interstate commerce?
>
> Again, what purpose would be subserved by all the regulations established to secure the enjoyment by the public of an efficient and reasonable service, if there was no power in government to prevent all service from being destroyed?"

The Chief Justice further stated (page 352) that—

> "Engaging in the business of interstate commerce carriage subjects the carrier to the lawful power of Congress to regulate irrespective of the source whence the carrier draws its existence, and as also by engaging in a business charged with a public interest all the vast property and

every right of the carrier become subject to the authority to regulate possessed by Congress to the extent that regulation may be exerted considering the subject regulated and what is appropriate and relevant thereto."

Many instances of the complete regulation of the common agency are to be found in the Transportation Act, taking hold of the subject without distinction as to whether the exertion of the jurisdiction conferred upon the Commission would be in connection with interstate rather than intrastate operations or use.

The proviso in respect of car service found in Section 402 (17) of the Transportation Act in respect of local authority is significant not for what it reserves to the states but for what it implies. The proviso is in these words:

> *Provided, however,* that nothing in this Act shall impair or affect the right of a State in the exercise of its police power to require just and reasonable freight and passenger service for intrastate business, *except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act;*"

thus asserting paramount authority over the entire subject.

Section 402 (18) of the Transportation Act prohibits new mileage construction or acquisition by any interstate railroad except after approval by the Commission and affirmatively dispenses with the necessity for approval by any State Commission in these words:

> "From and after issuance of such certificate and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation or abandonment covered thereby;"

thus displacing and superseding local authority.

In short, the incidence of the statute is upon the instrumentality of interstate commerce, regardless of its local or interstate functions. In like manner the Transportation Act (Sec.

405 (4) provides that the Commission may require the joint use of facilities, without any restriction discernible in the section as to interstate commerce. Section 407 authorizes the pooling of freight and earnings between different and competing railroads under certain conditions and is not restricted to earnings from interstate commerce, and the same section contains important provisions as to permissive consolidations.[1]

Other provisions of the Transportation Act not elsewhere specifically adverted to are to be found in Section 435, amending the accounting section of the Interstate Commerce Act so as to authorize the Commission to deal, *inter alia*, with the question of depreciation—manifestly without any apportionment as to interstate or intrastate use.

Section 439 deals with the issue of securities and the assumption of obligations by carriers subject to the Interstate Commerce Act wholly without reference to the question whether the proceeds of the securities are to be employed in interstate or intrastate commerce or are issued in reimbursement of the company's treasury for expenditures for improvements used in either or both services.

These provisions are based upon a purpose to sustain the welfare of and the public interest in the instrumentalities of interstate transportation permanent in their character in respects which are obviously within the field of regulation. It may be that there is doubt whether a common carrier in interstate commerce has devoted its properties to the public use in such wise that the United States, as distinguished from the several states having jurisdiction over the dedication, might prevent a withdrawal of the use or be authorized to require

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[1]The question whether these consolidations can be effected "in defiance of State legislation" (see dictum of Mr. Justice Brown in *L. & N. R. R. Co. v. Kentucky*, 161 U. S. 677, 702) does not seem to be important at this time, as the Senate theory of compulsory consolidations was replaced by the permissive setup finally embodied in the Transportation Act. It is certain that Congress has the power to prohibit the consolidation of competing lines and may relax the prohibition to the extent accomplished by the Transportation Act. In this connection see the admirable paper by Blewett Lee, Esq., *American Bar Association Journal*, December, 1920.

performance by the carrier of a duty which it has assumed (see *Wilson v. New*, 243 U. S., 332 (350), and dissenting opinion of Mr. Justice Pitney (p. 384)), but it is clear that so long as they operate in interstate commerce and are permitted by the states of their creation to hold themselves out as such agencies, they are, as elsewhere pointed out, as subject to regulation in all pertinent particulars as if originally incorporated by Congress for the purpose of engaging in interstate commerce.

Dedication of property to the public use would seem to subordinate the property to the regulation of that public authority representing the people in the particular matter, that is, the United States and the states in their respective domains. The dedication is not to the State or to the United States but to the public, and the public acts through its constitutional agencies.

The power of local regulation, like the power of local taxation, must be exerted with due regard to the interstate business conducted by the common agency. This principle, illustrated as to the local taxing power in *Postal Tel.-Cable Co. v. Richmond*, 249 U. S. 252, has been applied in sustaining state legislation relating to car supply—decided, however, before the amendmeno of the Interstate Commerce Act relating to car distribution accomplished by Section 402 of the Transportation Act—in which state statutes upon the subject have been sustained in certain cases where the requirements of the statute were held tt have been saved *by the consideration that they were construed as giving to the requirements of interstate commerce. Ill. Cent. R. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275.

Car supply is in times of car shortage dependent upon the available pool, which forms the common source for interstate and intrastate supply. In a situation of this sort and in view of the necessity for equality of treatment and the absence of discrimination for or against particular shippers or for or against intrastate or interstate commerce, it is not to be doubted that Congress may constitutionally regulate the whole subject. It has undoubtedly exerted its authority so as to provide for an absolute equality in treatment as to the distribution of coal cars by the provisions of Section 402 (12) of the Transportation

Act, in which there is discernible no effort to distinguish in the distribution required between interstate and intrastate shipments. Nor can there be any doubt of the right and authority of Congress to deal with the subject.

The blending of earnings, of net railway operating income, is more complete and less segregable than the separation of interstate and intrastate car requirements obviously subject to national control.

REGULATION OF THE AGENCIES OF INTERSTATE COMMERCE.

That Congress may exert visitorial power over State corporations engaged in interstate commerce to the extent necessary to regulate, facilitate and remove impediments is thoroughly established.

> "The power also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and encouraged."
>
> *Gloucester Ferry Co., v. Penn.*, 114 U. S. 195 [284]; *I. C. C. v. Goodrich Transit Co.*, 224 U. S. 194.

In the *Civil Rights Case*, 109 U. S. 18, referring to the commerce and other *direct* powers, the court said:

> "Congress has power to pass laws for regulating the subjects specified in every detail and the conduct and transactions of individuals in respect thereof."

The State can do nothing which will directly burden or impede the interstate traffic of a corporation of its own creation, or impair the usefulness of its facilities for that traffic or interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States. *Ill. Cent. R. R. Co. v. Illinois*, 163 U. S. 142.

> "To 'regulate' in the sense intended is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and the public at large. *Second Employer's Liability Cases*, 223 U. S. 1, p. 47.
>
> "Congress is empowered to regulate; that is, to provide the law for the government of interstate commerce; to

enact 'all appropriate legislation for its protection and advancement' (the *Daniel Ball*, 10 Wall. 577, 564); to adopt measures to 'promote its growth and insure its safety' (*County of Mobile v. Kimball*, 102 U. S. 691); 'to foster, protect, control and restrain.'" *Second Employer's Liability Cases, supra; Houston, etc. Ry. v. U. S.*, 234 U. S. 342, 351.

Congress may employ a corporation created by a State as a fit instrumentality to accomplish the purposes of Congress in the regulation of commerce. *St. L., I. M. & So. Ry. Co. v. Taylor*, 210 U. S. 287; *Luxton v. North River Bridge Co.*, 153 U. S. 530.

That Congress may with the acquiescence of the State make use of the agencies of the State in co-ordinating the work of the State and Federal commissions is undoubted. *Halmgren v. U. S.*, 217 U. S. 509; *Robertson v. Baldwin*, 165 U. S. 278.

Familiar illustrations of the undoubted and sufficient power of Congress in dealing directly with existing State agencies in the assertion of specific governmental powers are to be found in the Clayton Act, dealing with the personnel and internal governance of interstate corporations, the acts admitting State banks into the Federal Reserve system, permitting State banks to become national banks (*Casey v. Galli*, 94 U. S. 673); conferring upon the American Railway Association power to fix the standard height of draw bars (*St. L., I. M. & So. Ry. Co. v. Taylor, supra.*)

In short, Congress may, in the process of regulating their interstate functions, treat State corporations as though created by Congress. (*Hale v. Herkel*, 201 U. S. 43 [75]; *Northern Securities Co. v. U. S.*, 193 U. S. 345, 347.

COMMERCE CLAUSE EXTENDS TO ALL RELATIONS OF INTERSTATE INSTRUMENTALITY HAVING DIRECT BEARING ON ITS ABILITY TO FUNCTION.

The power of Congress to regulate interstate commerce, necessarily extending to the instrumentalities of interstate commerce, must of necessity extend to all relations which have a direct bearing upon the ability of the instrumentality to

survive and function. *Wilson v. New*, 243 U. S. 332; *U. S. v. Ferger, 250 U. S. 199, 203.* In the latter case the Court said with reference to the power to regulate:

> ". . . Obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (*In Re Debs*, 158 U. S. 564) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves."

From this standpoint there is no distinction between an instrumentality devoted to a public use in interstate transportation under the general law and instrumentalities such as the Pacific Railroads, specifically created by Congress for the purpose of engaging primarily in interstate transportation, but also, as a necessary and inseparable incident to their success, competition and survival, in intrastate commerce.

The Commerce Clause takes hold of the instrumentalities of commerce without reference to the jurisdiction to which they may owe their corporate allegiance, and when the State, either of their original creation or in which they have been permitted to transact local business, has organized them in the first instance with power to engage in interstate commerce or has admitted the corporation of another State within its jurisdiction for the purpose of conducting intrastate commerce along with its interstate functions, they automatically subordinate their power over the resulting status to any exertion of authority which Congress may put in motion under the Commerce Clause.

In short, when the State authorizes the commingling of interstate and intrastate commerce through the same agency or instrumentality in such wise that the common operations have become in their nature so related or inseparable or incapable of segregation as reasonably to become the subject for regulation by a single ultimate authority in order to avoid destruction or disintegration or to protect the public service, the public welfare as reflected in the exertion of the Commerce power must prevail over State authority.

And this result would hold good no matter how formally the power of the State was originally reserved, that is to say, whether by the charter creating the corporation in the first instance for the purpose of engaging in interstate and intrastate commerce or by the terms on which the corporation of another State was admitted within its borders to engage in transportation in intrastate commerce.

The whole subject passes into the field of Federal regulation in those respects in which the two operations become joint and inseparable in such wise that dealing with the one in any given particular necessarily involves the regulation or burdening of the other. There is nothing in *Mo. Pac. Ry. Co. v. Kansas*, 216 U. S. 262, or *Atlantic Coast Line v. N. Car. Corp. Comm.*, 206 U. S. 1, suggesting the contrary.

As stated in *First National Bank v. Union Trust Co.*, 244 U. S. 416 (444):

> ". . . The State may not by legislation create a condition as to a particular business which would bring it into actual or potential competition with the business of national banks and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency."

If, therefore, the power of Congress over the *survival* of the agencies of interstate commerce through the regulation of its revenue is the same, whether the agency be created by Congress or under the laws of the States, the principle of *First National Bank v. Union Trust Co.* should apply. The State should not be permitted either by affirmative statutory reservation or by the common law right of regulation to bring about a situation that would destroy the instrumentality. The question involved is not the right of the corporation, which may be stopped, but the right of the people of the United States to insist that the Commerce Clause shall take hold of all of the permanent instrumentalities of interstate commerce in order to regulate and sustain them in such wise as Congress may in the proper exertion of the power determine.

"As the power to regulate the instrumentality was coextensive with interstate commerce, so it must be, if authority to regulate is not to be denied, that the right to exert such authority for the purpose of guarding against the injury which would result from the making and use of spurious imitations of the instrumentality must be equally coextensive."

Fraudulent Bill of Lading Case (U. S. v. Ferger), 250 U. S. 199, 203.

ESSENTIAL UNITY OF INTERSTATE AND INTRASTATE TRANSPORTATION PERFORMED BY A COMMON AGENCY.

Perhaps nothing can illustrate more forcibly the intrinsic unity of transportation service and the necessity for a common control than congressional legislation arising out of the status of war and the efforts of the carriers to coordinate their services both interstate and intrastate. These phases are of such recent historic emphasis that no effort is made to elaborate them in detail.

The declaration of the national unity of transporation made plain in the decision in *Wilson v. New*, 243 U. S. 332, related to the status of peace and was not based in any respect upon any anticipation of a state of war or the military power.

When the State of North Dakota, one of the amici curiae on this appeal, insisted that the Federal Control Act had not affirmatively reposed control over intrastate rates in the President, much of the argument now advanced was asserted in order to preserve to that State freedom of action as to its local rates. The contentions there made were repudiated by the Supreme Court in *N. Pac. Ry. Co. v N. Dakota*, 250 U. S. 135.

Many of the considerations sustaining the conclusion that the Federal Control Act conferred jurisdiction upon the President to fix intrastate rates during the period of federal control holds good as to the bearing of the Transportation Act upon the jurisdiction of the Interstate Commerce Commission in the initiation of changes in the rate level. The adjustment of rate levels to produce an aggregate net railway operating income compels the conclusion that no divided authority could produce the result contemplated by Section 422.

As said in the North Dakota Case—

> "The elementary principle that under the Constitution the authority of the Government of the United States is paramount when exerted as to subjects concerning which it has the power to control, is indisputable. This being true, it results that although authority to regulate within a given sphere may exist in both the United States and in the States, when the former calls into play constitutional authority within such general sphere the necessary effect of doing so is, that to the extent that any conflict arises the State power is limited, since in case of conflict that which is paramount necessarily controls that which is subordinate."

No better answer could be made to the suggestion that the power of the Interstate Commerce Commission to initiate rate adjustment under Section 422 of the Transportation Act must be restricted to interstate rates than the following quotations from the North Dakota case (p. 151):

> "The confusion produced is again aply illustrated by the rule of interpretation by which it is insisted that the express power to fix rates conferred by the statute was rightly disregarded. Thus, while admitting that the power which was conferred to initiate rates when considered in and of itself included all rates, it is nevertheless said that such power must be presumed to be limited to the only character of rates which under the prior law the Interstate Commerce Commission had the power to consider, that is, interstate rates, because the new rates when initiated were to be acted upon by that body. As, however, the statute in terms gives power to the Interstate Commerce Commission to consider the new rates in the light of the new and unified control which it creates, the error in the contention becomes manifest, even putting out of view the fact that by the effect of the duty imposed and the new control created the new rates applying to the new conditions were within the purview of the power which the Interstate Commerce Commission previously possessed. Certainly, to mistakenly disregard one provision of the statute intended to give effect to another and upon that basis to decide that the statute is not enforceable, cannot be said to be a correct interpretation."

The subordinate nature of the power of the state to deal with intrastate rates is thus stated by the Supreme Court in *Dakota Central Telephone Company, et. al.* v. *South Dakota*, 250 U. S. 163.

> "Inherently the power of a State to fix rates to be charged for intrastate carriage or transmission is in its nature but derivative, since it arises from and depends upon the duty of those engaged in intrastate commerce to charge only reasonable rates for the services by them rendered, and the authority possessed by the State to exact a compliance with that duty. Conceding that it was within the power of Congress, subject to constitutional limitations, to transplant the state power as to intrastate rates into a sphere where it, Congress, had complete control over telephone lines because it had taken possession of them and was operating them as a governmental agency, it must follow that in such sphere there would be nothing upon which the state power could be exerted except upon the power of the United States, that is, its authority to fix rates for the services which it was rendering through its governmental agencies. The anomaly resulting from such conditions adds cogency to the reasons by which in the North Dakota Case the error in presuming the continuance of State power in such a situation was pointed out and makes it certain that such a result could be brought about only by clear expression or at least from the most convincing implication."

It may be unnecessary, but to avoid any possible misunderstanding, we desire to repeat that there is no suggestion that the Transportation Act proposes to go further than to subject the intrastate rate structure to accommodation by the Interstate Commerce Commission to the rate adjustments found necessary by the Commission in discharging its mandatory duty under Section 422—and, of course, in cases of discrimination under Section 3 of the Interstate Commerce Act as amended by the Transportation Act. The State takes the intrastate rate fabric subject to adjustment and revision within the outline—result—and orders of the Interstate Commerce Commission.

INADEQUACY OF COMMERCE ACT BEFORE AMENDMENT OF 1920.

Analysis of the Advance Rate Cases heard before the Interstate Commerce Commission beginning in 1910, demonstrates that the procedure for adjusting rates prescribed by Section 15 of the Interstate Commerce Act was not sufficiently flexible to sustain the American system of transportation or enable it to expand with the high speed necessary to meet the requirements of commerce. The rate-making section of the Commerce Act was written around the individual rate. It did not tend to encourage consideration of the effect of these rates in their aggregate upon individual carriers or upon the carriers as a whole. And in those cases in which the railroads had taken steps which were of necessity concerted and in clear violation of the Sherman Act, to secure contemporaneous advances in their respective competitive rate structures, the procedure and jurisdiction of the Commission was manifestly unsuited to the necessities of the situation.

Certain members of the Commission had objected to the consideration of the carriers' necessity for any general increase in revenue until the proposed advances thought necessary by the carriers had been initiated by the carriers, allocated to specified rates or items and filed for scrutiny as to the reasonableness, *per se*, of the individual increases proposed. *The Five Per Cent Case*, 31 I. C. C. 351, 355.

When the particular increases were accordingly filed and suspended as a whole for investigation and railway revenue was found to be inadequate there was further vigorous dissent against the subsequent granting of general relief by the Commission, on the ground that the action of the Commission in granting a horizontal increase would constitute "a new and radical departure and a most serious and portentous step, in that by this step the Commission is shown to deem itself justified in sanctioning these increased rates . . . upon consideration of general financial and operating results." 32 I. C. C. 337.

It was further objected that the necessities of the carrier had never been regarded as the test for determining the reasonableness of rates or rate structures; that the sole test is the reasonableness or unreasonableness of each individual rate *per se*.

These objection had some basis in the fact that Section 15 of the Commerce Act was founded primarily on the common law definition of a reasonable individual rate. Each transportation service is regarded by the common law as a separate equation having no necessary legal relation to results in the aggregate or to transportation as a whole.

Common Law Regarded Individual Rate Not Aggregate Result.

The aggregate result might constitute an excessive return upon the fair value of the property or it might be so inadequate as to destroy the credit of the carriers involved and put an end to the extension of facilities and service. The common law is substantially indifferent to either extreme or to any result produced by rates found or presumed to be reasonable *per se*, yet until February 28, 1920, the Commerce Act of the United States gave to the Commission little direct authority to view the problem from any broader standpoint and but little encouragement to substitute for the atomic common law process a test based more appropriately on results.

This enforced indifference to net results was exemplified in a number of rate cases. "A railroad company may be operated with a less return than it ought to enjoy or even at a loss, but neither condition of affairs would justify the exaction by it of rates that are higher than they reasonably should be for services performed, all things being considered." *Railroad Comm. v. Illinois, etc., R. Co.*, 20 I. C. C. 181, 186; *The Five Per Cent Case* 31 I. C. C. 351, 359. See also *dictum* of Judge Brewer in *Cotting v. Stockyards*, 183 U. S. 79, which, however, six of the Justices declined to follow.

In granting partial relief in the *Fifteen Per Cent Case* of 1917, 45 I. C. C. 303, a quorum of the Commission necessary to legal action responded to an appeal of the railroads for emergency relief by consenting to hear the proposal for horizontal increases without prolonged investigation as to specific rates and localities, asserting that investigations of such detailed character were not useful in the exercise of the functions which the Commission was called upon to discharge in determining the reasonableness of proposed rate increases covering the entire country.

The report of the case discloses that this procedure became practicable *only through waivers by the carriers of technical impediments, accompanied by a pledge on their part that if any increases which might be allowed by the Commission were subsequently found by the Commission to be unnecessary they would promptly adjust their schedules accordingly.* The necessity for accommodations of that character plainly indicated the lack of flexibility of the Act and the lack of necessary power in the Commission.

It was necessarily recognized (45 I. C. C. 317) that in substance the issue was the reasonableness *per se* of the proposed increased rates rather than the question of the credit of the carriers and their necessity for general relief.

The proper economic basis for the determination of such inquiries was aptly stated by Commissioner Harlan in his opinion dissenting from the action of the majority in restricting the relief granted:

> "The record in my judgment demonstrates a proposition that has long been clear to me, namely, that a rate is a public question and that the existing rates, aside from any interest that the owners of our railroads may have in the matter, could well be advanced in the public interest, in order that assurance may thus be given for the early enlargement of our transportation facilities."

The position, however, that the pending issue thus appropriately interpreted by Commissioner Harlan was one exclusively for Congress and not for the Commission to handle was asserted in an opinion by Commissioner McChord in these words:

> "The issue presented is in reality one largely of governmental policy, rather than a question whether the rates sought to be made effective July 1 are reasonable for the service of transportation."

It is needless to suggest that the administration of the Act proceeded with the utmost difficulty under these circumstances and that a part of the membership of the Commission did not feel at liberty to give full consideration to the plain necessities of the carriers upon a hearing restricted to the question of general relief.

The "Insoluble" Problem.

Other conditions of the Commerce Act, one procedural and one fundamental, deprived the Commission of necessary discretion and flexibility and proved additional stumbling blocks in the way of adequate relief before the Commission.

The express provisions of the Act placed the burden of proof upon the carriers to justify higher rates. This naturally resulted in a disposition, if not a peremptory duty, on part of the Commission to hold the carriers to a pretty definite discharge of that burden. Thus in the *Fifteen Per Cent Case*, Commissioner Meyer, dissenting from the partial relief granted in that case, asserted: "Before important action like this is taken *the most conclusive proof of its necessity should be before the Commission.*" 45 I. C. C. 303, 331; also that the adverse ratios of the available four months of 1917 "do not *necessarily* predict unfavorable results for the entire year." *Ib*, 334, etc., etc.

The constructive administration of the Commerce Act was accompanied by a yet more fundamental difficulty, denominated by Senator Cummins during the hearings of the Newlands Committee as the insoluble problem. *The Commission had no power to adjust the rate structure to the circumstances of the different carriers.*

In the first report in the *Five Per Cent Case of 1914*, 31 I. C C. 351, it was recognized that the net operating income of the carriers in official classification territory, considered as a whole, was smaller than was demanded in the public interest. The Commission said:

> "Treating as one road the thirty-five railway systems that have joined in this application for our approval of a so-called five per cent advance in their freight charges, we have reached the conclusion that their net operating income is insufficient and should be increased." (p. 386, 403).

General relief in that proceeding was denied, largely because of the Commission's disapproval of the items selected by the carriers for advances. The majority opinion, however, pointed out the disparity in net operating income realized by the various

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roads and asserted that the condition of some of the carriers involved was so prosperous "that they clearly do not need a higher net income." (p. 384.) The denial of general relief unquestionably left many of the carriers with inadequate revenue. In like manner the denial of relief in 1917 was based in part upon the proposition that the admitted necessities of certain roads cannot justify a course of action that is unwarranted by the condition of the larger number of strong and successful lines.

It may be that no complaint of this situation is justified from the standpoint of the less fortunate railroad. They take the ordinary chances of competition and commercial disaster. But the service of the public dependent upon these lines is a different matter; and no system of regulation under the commerce clause can be regarded as statesmanlike which fails to make an effort to stabilize credit and returns by adjusting the general rate structure to the necessities of the different carriers. No such effort was discernible in the Commerce Act.

Defect in the Former Statute.

The Commission had neither the power nor the responsibility necessary to avert a gradual breakdown in credit without evading the procedure contemplated by the Commerce Act or without producing revenue for certain carriers in each competitive territory which would have been so excessive as to impair the Commission's standing before a public not likely to understand the difficulty. Forced to choose between excessive revenue for certain roads and inadequate revenue for others, it followed the latter course in the first reports in those hearings brought on by concerted action of the carriers in unavoidable violation of the Sherman Act.

From this it results that the adequate regulations of railways under competitive private ownership requires that broad powers of rate adjustment be given the Commission through the power to initiate rates and to control divisions of rates, etc., and that excessive disparity in results which might remain notwithstanding the exercise of a fair discretion in these respects, constituting a by-product of rate levels necessary to sustain transporta-

tion as a whole, should be further levelled by a fair regulation of excess earnings in the public interest.

All of this amounts merely to the rational adjustment of the rate structure to the circumstances (and the constitutional and reasonable demands) of the various carriers. The Commerce Act was wholly lacking in these fundamentals.

Under these inflexible conditions inadequate revenue from time to time and gradual disintegration of railway credit were inevitable.

The Newlands (Underwood) Resolution.

Resulting from these considerations and concurrently with their demonstration in the advance rate hearings beginning in 1910, there arose an increasing conviction that the restrictive and controversial basis of Section 15 of the Commerce Act prevented the Commission from viewing transportation as a whole or else from giving effect to its constructive conclusions. This thought was given official sanction in the message of the President of the United States, to be found in the Congressional Record for December 7, 1915 (p. 99), in which it was recognized that the transportation problem was an exceedingly pressing one. Congress was urged "to provide for a commission of inquiry to ascertain by a thorough canvas of the whole question whether our laws as at present framed and administered are as serviceable as they might be in the solution of the problem."

This message was appropriately interpreted by Senator Underwood as refering to the necessity for legislation to strengthen railway credit in order to avoid a breakdown of the transportation system. He asserted that the question was whether we were to avoid the next step—government ownership—and whether the American people were willing to put up with an unsafe, inferior and inadequate transportation system, or have the intelligence to pay for one that would supply their needs. (Cong. Record, Feb. 22, 1916, p. 3421.) The Joint Committee, appointed in July, 1916, to investigate the problem pursuant to the President's message and the Newlands (Underwood) Resolution, functioned until its duties were superseded by the war and Federal control. The Senate and House committees

took up the work where it was left off by the Joint Committee. The Transportation Act, 1920, approved February 28, 1920, is the direct result.

The recent Act leaves unchanged the functions of the Commission and of the railroads as to changes *in individual rates* proposed by the carriers. As to such rates it leaves the procedure and burden of proof substantially unchanged. The general considerations affecting communities in their relation to each other and the methods of determining the relation of rates are on the same general basis as under the Commerce Act.

The Fundamental Change.

The epochal change in the statute lies in the mandate that the Commission shall from time to time initiate on its own responsibility and maintain rates that will produce a fair aggregate return, under honest and economic management, upon the fair aggregate value of the railway property devoted to the transportation service. This does not assure returns to individual carriers on any definite basis. It treats the railroads as a whole, or in such groups as the Commission may establish, as a single transportation machine which, in order to survive, must be enabled to earn a living return on its fair total value. What portion of the gross revenue each road will receive and earn from the rates pitched on this basis is left dependent upon ordinary considerations of location, competition and efficiency—subject to some power on part of the Commission to equalize inadequate revenue in the public interest through control of divisions and the adjustment of rates. This follows because the Commission may make its adjustments of the rate level from time to time by horizontal increases or decreases or by a readjustment of rates in groups or even in individual spots.

Grouping of carriers is contemplated for the more accurate and convenient execution of this duty. From the standpoint of administrative mechanism and public confidence grouping would seem essential, but whether embraced in one national group or in the familiar classification territories or otherwise, it would be incumbent upon the Commission to scrutinize the effect of rates upon the different carriers in order to see that

the rate adjustments put into effect by the Commission were not unduly concentrated or monopolized.

The radical change lies in the direct mandate to the Commission *to initiate and maintain* a level of rates that will enable the carriers as a whole or in the different competitive groups defined by the Commission to earn a fair ratio of return upon the aggregate value of the transportation machine in each group. After two years this ratio of return must be ascertained and declared from time to time by the Commission. It must, first of all, be a fair rate of return on aggregate railway value, and in arriving at the rate the Commission must give adequate consideration to the transportation needs of the country and the necessity for the continual enlargement of transportation facilities in the public interest.

Railway Revenue No Longer a Private Matter.

Railway revenue is no longer even primarily a private matter. While changes in rates by carriers under Section 15 of the Commerce Act are on the old basis, the initiation of rates by the Commission is a new power pitched on a public basis and embraces intrastate as well as interstate rates. State authorities proceed as heretofore in the adjustment of local rates, but must proceed in substantial harmony with interstate rate levels or adjustments established from time to time by the Commission under Section 422 of the Transportation Act. Hence responsibility in gross and in detail rests upon the threshold of the Interstate Commerce Commission as the agency of Congress chosen under the Commerce Clause of the Constitution.

Regulation of Excess Earnings.

In order to induce Congress to adopt a definite rule for rate making that would be more or less automatic in its operation, stabilize the credit of the railroads, and encourage the Commission at all times to deal constructively with these properties, and the public to accept the result, the published record of the House and Senate Committee hearings which resulted in the Transportation Act will disclose that representatives of the owners of approximately ten billions of American railroad

securities urged Congress to provide for the regulation of any excess income over and above a fair return upon the fair value of their property. The desirability of this process, arising out of radical disparity in return realized by carriers in the same competitive basin, has been stated.

In view of the attack made upon the provisions under discussion by the brief filed by National Association of Railroad Commissioners, the Supreme Court might be assisted by a correct statement of the theory, effect and clear constitutional basis for the program.

The statute, as adopted, asserts in substance that in order to sustain competitive transportation as a whole, rates may have to be established which are intentionally higher than necessary to satisfy the private rights of sundry individual carriers, or to the discharge of their public duties. To the extent that the rates received by any carrier reflect an excess over a fair return upon its property, they are accordingly declared to be received tentatively and in trust for a transportation fund to be administered in furtherance of the public interest in transportation.

An analytical statement of the provision answers most of the objections which have been directed against it. Thus Mr. Chas. E. Hughes, in his letter dated September 19, 1919, published in the House Hearings and referred to in the brief above mentioned, questioned the constitutionality of that provision relating to the disposition of excess earnings *as embodied in the original draft of the Cummins Bill* (*Senate 2906*), and bases his objections primarily on the criticism that, since the section provides that rates must be just and reasonable, they are therefore lawful, and that the provision for the recovery of any part of the earnings resulting from such lawful rates appears to be nothing more than a taking of property by the government contrary to the Fifth Amendment.

His exact statement of the situation as he sees it is:

> "If, however, the rates thus fixed, charged and received by a carrier are to be deemed just and reasonable for the services rendered, the carrier is entitled to these receipts as its property, and the taking by the Government of any portion of these receipts (except under a

valid tax) for general governmental purposes or for the benefit of other carriers would appear to be a taking of property contrary to the Fifth Amendment to the Federal Constitution."

We have already seen that a correct understanding and analysis of the process of excess earnings regulation is impossible unless it is clearly borne in mind that these rates, while final so far as payment by the shipper is concerned, are specifically impressed with a trust when and as received by each carrier, to the extent that they may produce in the aggregate an excess over a reasonable return upon the property of the carrier held or used for the service of the transportation.

RATES ADJUSTED TO GROUP REQUIREMENTS.

It is erroneous to conclude that they are just and reasonable for every carrier to retain merely because Congress has established them for the shipper to pay. They are to be established not for any particular carrier or for any specific service by any particular carrier. They are to be adjusted to a level necessary to sustain transportation in the aggregate or in the group. They are not, as erroneously assumed by Mr. Hughes, "deemed just and reasonable for the services rendered." On the contrary, they are expressly declared to be necessarily *in excess of what is just and reasonable* for the service rendered by particular carriers. They are nevertheless just and reasonable as a uniform rate for the shipper to pay, as it is obviously just and reasonable for the shipper to pay whatever is necessary to keep alive the essential agencies of transportation in competitive areas; but that is very different from the assumption that rates made on a group or aggregate basis have been declared to be "just and reasonable" or final as to every carrier and every service.

Any such conclusion rests upon the hypothesis that Congress must perpetuate that discredited method of establishing rates which is based exclusively on the cost or value of each particular service. Neither cost nor value of each service is capable of satisfactory proof. The cost varies with every shipment and with every carrier. The value of the service is different for

every shipper. So in adopting the test of results in the aggregate as a material factor for the adjustment of rates, Congress is adopting, as far as it is practicable to apply the measure to groups of competitive carriers, the service at cost basis so widely employed in the case of local utilities. It is the final test uniformly applied by the courts in determining the reasonableness of rates as a whole and is a process squarely within the purview of the commerce clause.

Rates May be Tentative or Conditional.

The contention is then made that some of these rates may have been established in proceedings to test the reasonableness of specific rates, such as under Section 15 of the "Act to Regulate Commerce," and that surely rates so established cannot be regarded as carrying any excess—particularly where they happen to be non-competitive rates. A complete answer to this suggestion is that Congress may undoubtedly make rates for the future for any carrier based on the best available data with the hope that the rate structure thus guessed at will produce a reasonable return, or it may permit rates which are relatively just and free from discrimination but which, so far as the carrier is concerned are tentative and subject to the test of actual results. The former is prophetic and uncertain. The latter is absolute in its accuracy. Is Congress to be denied the right to employ an absolute measure or a combination of the two methods because in the past it has employed, with unscientific and unsatisfactory results, the inaccurate method of prophecy? We find nothing in the commerce clause to warrant any such limitation and as long as specific commodities or integral railway services are not singled out for discriminatory action the carrier cannot complain of appropriate methods of rate regulation where a fair and reasonable return in the aggregate is assured to the carrier complaining.

Modification of Shippers' Common Law Right.

The criticism next seems to switch from the complaint of the carrier to a complaint on behalf of the shipper who would be

unlawfully compelled, so it is said, to pay in rates the "unreasonable" excess to be recovered from any given carrier. Thus, as asserted by Mr. Hughes:

> "On the hypothesis that the charges are unreasonable, the power to authorize them, no less than the power to collect them, falls. The exaction and maintenance of such charges *would deprive shippers and passengers of their property without due process of law.*"

This again loses sight of the fact that rates may properly be made on a group basis. Of what "property" is a shipper being deprived when he is asked to pay rates that will produce a fair return on the aggregate railway property in any rate-making district? He has no constitutional right to insist that Congress shall make different rates for each carrier. He has no right to complain that rates are made with reference to aggregate or average conditions. He certainly has no right, superior to the commerce clause, to demand that Congress shall permit essential agencies of transportation to be destroyed through competition in rates. Congress has by this Act almost completely suppressed competition in rates as being destructive of the carriers' ability to perform their public functions. And Congress has the undoubted power under the commerce clause to establish and enforce uniform rates in competitive areas that will produce an "unreasonable" return to certain carriers, if that process is necessary to sustain essential competitive lines. That excess cannot be repaid to the shipper. It would then constitute a rebate that would attract all competitive traffic and defeat the main objective, which is the survival of necessary agencies of transportation.

Railroads Must Survive Before They can Compete.

The right of a shipper to have his commodities transported by each common carrier at a reasonable rate for each service, whatever that may mean if it implies anything contrary to the theory of the Transportation Act, is a mere common law right that is as much subject to the discretion of Congress under the commerce clause as was the common law right of carriers

to pool their tonnage, to combine or to enforce the fellow-servant doctrine as to their employees. It was never a property right or a right protected against modification by Congress under the commerce clause. Many of the common law rights of carriers have been abrogated in order to enforce a competitive status among competing carriers. They must survive before they can compete. Any rate regulation found necessary by Congress to enable them to survive cannot be "unreasonable" from a constitutional or any other standpoint, and we have never understood that the legislation of Congress or its results must be found by the courts to be reasonable if it is appropriate and within the scope of any of the powers delegated by the Constitution and does not run counter to some express constitutional limitation.

Adaptation of Rate Structure.

It is in effect contended that Congress must finally establish the same rate for a railroad which hauls one bale of hay between two given points as it establishes for another railroad hauling a million bales between the same or comparable points, and that some consitutional right is violated if Congress or the rate-making authorities give adequate consideration to the factors of density or cost. It is perfectly obvious that any such contention is ill-founded. The common law imposes no such requirement. The spirit of the commerce clause affirmatively forbids any such destructive conclusion.

All railroads are not entitled as a matter of law to the same return for a like general service, *Interstate Com. Comm. v. U. P. R. R. Co.*, 222 U. S. 541. In the *Covington Turnpike Case*, 164 U. S. 578, it was asserted that a road could afford to charge less toll by reason of dense traffic upon it than roads where the traffic was not so dense and that the legislative authority might appropriately recognize the distinction. Is it not clear that Congress may employ any appropriate method in order to give effect to the recognition of such distinction?

The United States Supreme Court has always approved the propriety of classifying railroads according to their earning power, per mile or as a system, for the purpose of determining

rates. Thus, in *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, a classification was held to be reasonable and proper which divided the railroads into classes according to gross earnings per mile and permitted the different classes to charge different rates. That principle is now embodied in many rate statutes. In the case cited the Court said:

> "It is very clear that a uniform rate of charges for all railroad companies in the State might operate unjustly upon some. *It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads;* and the general assembly in the exercise of its legislative discretion, has seen fit to do this by a system of classification."

That is, in its last analysis, exactly what is accomplished by the provision under discussion.

Confronted with the necessity that competitive rates must be uniform, Congress cannot adapt these rates to the circumstances of sundry carriers by making them unequal. The low rate would attract all of the business and destroy the competitor. Hence the only available process is to make the rates tentative so far as the carrier is concerned, subject to the test of aggregate result. It is a simple and effectual adaptation of a rate fabric to the varying circumstances of individual carriers and squarely within the principle announced by the Supreme Court.

In *Dow v. Beidelman*, 125 U. S. 680, the court sustained a statute which fixed passenger rates at from three to eight cents per mile according to the length of the road, approving *Chicago, etc., R. Co. v. Iowa, supra.*

In *Chicago, etc., R. Co., v. Wellman*, 143 U. S. 339, the court sustained the Michigan statute which fixes the passenger fares according to gross earnings per mile.

Other notable instances of classification along lines analogous to that employed in the Act are discussed in the following cases: *Ames v. Union Pacific*, 64 Fed. 165; *Houston, etc., R. Co. v. Storey*, 149 Fed. 499; *Commissioner v. Wabash R. Co.*, 123 Mich. 669, 82 N. W. 526. See note, 21 Ann. Cas. 191; 14 Rose's Notes 222.

The criticism referred to asserts that the process of regulating rates according to the result of those rates "confuses the Government's power over rates with an asserted Governmental power over the amount of net earnings from lawful rates."

The error in that assertion is twofold. It assumes that rates may not be fixed tentatively and subject to the test of actual results, and that because they are made lawful they are necessarily final for all purposes.

If it were necessary to sustain the provisions relating to the disposition of excess earnings, it is demonstrable that these provisions are in effect merely a regulation of the individual rates collectable by the various carriers, worked out through a classification in accordance with the principle sustained in the cases above cited.

Scope of Commerce Clause.

But it is not necessary to restrict the inquiry to such narrow compass. The commerce clause is not a mere police power restricting Congress to a check upon individual rates, although it undoubtedly confers upon Congress as complete authority over individual interstate rates as is reserved to the several States over local rates in the assertion of their police jurisdiction.

The power to regulate commerce includes the power to adopt all appropriate processes to sustain the movement of commerce and preserve the essential competitive agencies through which commerce between the States is conducted. So long as individual carriers are not prevented by the legislation, as distinguished from the risks of the venture, from earning a fair return upon their property devoted to the public service, they cannot complain if Congress prefers to deal with rates in the aggregate rather than with each unit of service. It has long since become obvious to those observers who have remained open-minded upon the subject that commerce cannot be regulated in the public interest if Congress restricts its program of rate regulation to the unit measure basis.

The only limitation upon the legislative authority, is that the regulation of rates, whether by units or in the aggregate, shall

not prohibit the earning of a reasonable return upon the property employed in the public service. The power of regulation may be exerted *to that limit* by any appropriate process.

Principle Not Novel.

The process of regarding results as the test or the limit for rates is not novel. That test was among the earliest applied to American railroads, many of which began their existence with a charter limitation upon net income. Mr. Justice Hughes cited nine similar statutes as a common form of early rate or earning restrictions in the opinion in the Minnesota Rate Case.

Until opposition was precipitated against this proposal, it had not been seriously contended, since the decisions of the Supreme Court in the Granger Cases in 1874, that railroads have a right to realize or retain unlimited earnings or to net railway operating income in excess of a reasonable return upon the value of their property.

The State of Tennessee adopted a statute in 1883 providing for the punishment of any railroad which took, in rates, more than a "fair and just return" on its investment. The Federal court declared the statute invalid, not because the legislature was without authority to restrict income to a fair and reasonable ratio of return, but because the statute failed to prescribe with certainty what was considered by the law-makers to be a fair and just return which the railroad must observe. *L. & N. R. R. Co. v. R. R. Commission, 19th Fed. 679.*

The results of rates, as it was one of the first tests applied, is also one of the most recent. This fact is repeatedly illustrated in the ordinances and agreements with street car lines and local utilities whose rates are in many cases tested and automatically adjusted according to results.

The misconception of the process due to vague constitutional theories invoked whenever the legislative authority finds it indispensable in the public interest to make novel applications of well settled powers, will appear from a running summary of the controlling decisions.

A carrier which has devoted its property to public use is entitled to demand no return in excess of a fair return upon the

reasonable value of the property at the time it is being used for the public. *Smyth v. Ames*, 169 U. S. 466; *Covington, etc., Turnpike v. Sandford*, 164 U. S. 578; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19.

Reasonable Rates and Fair Returns.

Rates on particular commodities must not be confiscatory, but if particular or special rates yield a reasonable compensation, adequate total return is all that the carrier is entitled to demand (*Northern Pacific v. North Dakota*, 236 U. S. 585; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19.) and in providing for a constitutional return the right of the public to be charged only what is reasonable and just for the service is a primary consideration. *Covington etc., Turnpike v. Sandford, supra.*

The Transportation Act recognizes that this last mentioned restriction of the common law may be invoked to the destruction of railway credit and that it must not be permitted to depress rate levels to a point which will "kill the goose." The Act asserts, in short, the common law to the contrary notwithstanding, that it is reasonable for the public to pay whatever is necessary to produce a reasonable return under honest and efficient management upon the aggregate value of the railway systems.

These systems are accepted by the Act as they stand. Their construction was permitted by the law-making authority. Whether originally justified or not communities dependent upon their service have grown up within their curtilage. So the Transportation Act takes hold of the transportation machine as it now exists. Wasteful and improvident construction in the future is amply provided against by the sweeping control given the Commission over security issues and new construction.

The Supreme Court repeatedly asserted, at the time of the original decision in *Munn v. Illinois*, that "where property has been clothed with a public interest, the Legislature may fix a limit to that which shall in law be reasonable for its use." It was originally held that this limit, when fixed by the legislature, binds the courts as well as the public. *Peck v. Chicago, etc., R. Co.*, 94 U. S. 164; *Chicago, etc., R. Co. v. Iowa*, 94 U. S.

155. This latter expression was, of course, corrected in the later cases, (*Stone v. Farmers, etc., Co.*, 116 U. S. 307; *Georgia, etc., R. Co. v. Smith*, 128 U. S. 174; *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418; and *Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339.) in which the principle was recognized that the right of "regulation" does not carry the power to destroy, and that the question of reasonable return on the property is, in its final analysis and subject to a broad legislative discretion, for the courts to determine as a matter of fact and not for the legislature as a question of policy or expediency; but the court has never abandoned the proposition that the power of regulation may be exerted to limit the carrier to a reasonable return upon its property employed in the public use. That formula was expressly asserted in *Smyth v. Ames*, 169 U. S. 466, and remains the final expression of the court, reaffirmed in a multitude of decisions, which may be found cited in the margin in *Northern Pac. R. Co. v. North Dakota, supra.*

The corollary to the general principle, above referred to, may restrict the carrier to net earnings amounting to less than what would, abstractly considered, be a fair return on its property investment, but that is a risk which the carrier assumes and is thoroughly established. *Covington Turnpike Case, supra; Interstate C. C. v. U. P. R. Co.*, 222 U. S. 541; *Northern Pac. R. Co. v. North Dakota, supra.* The carrier fortunate enough to earn more than a fair return cannot complain if Congress elects either permanently or conditionally to waive any limitation upon its charges until definitely assured that the carrier will earn a fair return.

Aggregate Results.

It is obvious that the question what is a reasonable charge for each service is not capable of exact answer. The answer is always at best an approximation. It is almost invariably determined by the relation of the rate under analysis to other rates or established precedents or base rates.

On the other hand, the question of a fair return in the aggregate is a fairly easy question where, as under the Transportation Act, no necessity of separating interstate and intrastate

earnings is involved. Hence, any argument that Congress cannot use aggregate return as a test, but must confine itself to the unit measure, would, if sound, prevent Congress from using the accurate and adequate test and force it to employ the admittedly erroneous and approximate unit measure, in which the chances for error increase inversely with the size of the unit.

No doubt is to be entertained of the fact that each carrier is entitled to impose a reasonable charge for each service performed, when all shipments of any given class of commodities or under any rate are to be considered. This has been too frequently stated to be a matter for serious controversy. Thus in *Interstate C. C. v. U. P. R. Co., supra*, it was asserted by Justice Lamar, that the fact that the carrier's total income enables it to declare dividends would not justify an order requiring it to haul any particular commodity for less than a reasonable rate; but in that case the court very properly distinguished between proceedings involving a particular rate and proceedings involving the rates as a whole and asserted that "where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return;" and this distinction was clearly recognized in *Northern Pac. R. Co. v. North Dakota*, where the court said: "When the question is as to the profitableness of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business, and show that it has been denied a fair return on that value."

In short, the carriers may, in determining the question of constitutional return apply the gross test, with its stated limitations, and there is no sound reason why the government may not employ a like measure in checking results for the purpose of regulation.

The test, as to the limit of the police power of a State, as said by Justice Hughes in the *North Dakota Coal Rate Case*, is dual and reciprocal; the railroad can deny the right of the regulatory authority to single out and require it to haul any class of commodities at a loss, and the rate-making power can restrict

the railroad's total net revenue to a reasonable return; but, conceding that the railroad is not forced to haul commodities covered by any given rate for less than is a fair rate to be charged for the service or less than is compensatory to some extent, the railroad cannot complain of confiscation if its aggregate return upon the property investment is reasonable.

If these considerations apply to regulation under the police power of the several States, is it not clear that the power to regulate commerce, vested in the general government by the Constitution, not only runs parallel with the police power reserved to the States over local rates but embraces all possible methods and processes having a direct relation to that end and deemed appropriate by Congress, provided the result is not in conflict with the Fifth Amendment?

It has been shown that there is no merit in the contention that all railroads are entitled, as a matter of law, to the same interstate rate for a like general service under all circumstances. The contrary is frequently noted. Conditions are never identical, and paramount over all criticism of that character is the commerce clause, which permits all rational regulation, that does not reduce the earnings of the carrier below a reasonable return, is necessary to insure competition in service or other sound policy of regulation, and is based on other tangible and substantial requirements or classifications appropriate to the regulation of interstate commerce.

No Shipper's Right Involved.

The shipper's general remedy for specific overcharge is not proposed to be changed by the Act, and no constitutional right of the shipper is infringed by the proposed process of excess earnings reduction. (Transportation Act, 1920, Sec. 422 (17).

The shipper has, unless and until changed by Congress in the general welfare, a common law right to have his commodities transported at a reasonable rate, but, as we have seen, that imposes no limitations upon any process found by Congress to be necessary to sustain and regulate the commerce of the nation. If the shipper pays slightly more to one carrier than he would if the rate level were determined accordingly to that carrier's con-

dition, that consequence is necessary in the regulation of commerce, and he pays slightly less to other railroads than the rate authorities might properly allow. He has no right to insist that the fate of the agencies of transportation shall hang on the question of a single shipment over any particular carrier.

Again, the excess paid to the stronger carrier is so slight as to each shipment as to be negligible under the principle of *de minimis*. It becomes appreciable only when the total revenue of the carrier is computed. Clear violation of a constitution is never *de minimis* but the Constitution deals with practical and tangible considerations and is not sensitive to microscopic complaints against legislation necessary to move the commerce of a nation.

The shipper's right to pay each carrier only what is the minimum reasonable rate for each service by that carrier is not a right secured by the Constitution against modification. It is, on the contrary, a common law right, subject to any legislation found necessary by Congress under the commerce clause, and Congress can change the common law relationship between shipper and carrier whenever necessary in the public interest in the regulation of commerce, just as it has changed the common law liability and relationship between the interstate carrier and its employees, between the carrier and shippers in respect to limitations of liability, as well as other vital common law relationships found inconsistent with the regulation of commerce. In fact, any legislation regulating commerce changes the common law status unless merely declaratory. *Wilson v. New*, 243 U. S. 332, 347. Finally, the excess earnings to be received by sundry carriers are to be recaptured and expended in a very substantial sense in the interest of the service of the shippers who have produced them.

A strictly analogous provision of undoubted validity is found in the Commerce Act, asserting that rates must be reasonable and authorizing an individual shipper to sue for reparation and by this means recapture the unreasonable excess earning received by the carrier in specific shipments under a rate which was at the time of shipment the published prevailing rate. Prior

to the amendment of 1906 this was the only recourse possessed by the shipper against the imposition of unreasonable rates.

In the present case the recapture of the excess is by the Government in pursuance of the power of regulation. The excess earning is administered for the general use of the shipping public, which has produced the excess, and in order to avoid the destruction of competition.

Analogies to this intervention by the Government for the transfer and administration of funds which the holder has no constitutional right to retain are not necessary to the argument, but one may be found in the Massachusetts statute requiring savings banks to pay over unclaimed deposits to the State treasurer for administration by him as trustee. This constitutes no taking from the savings bank. *Provident Inst. for Savings v. Malone*, 221 U. S. 660.

The difficulty in many cases of determining who should recover and hold the excess over a reasonable rate paid in ordinary cases has resulted in the affirmative provision of the present Commerce Act that the shipper shall recover it, although he may have passed on the loss to the consignee, and the latter may have passed it on to the general public. As said by Justice Holmes in speaking of the Commerce Act in *Southern Pac. R. Co. v. Darnell*, 245 U.S. 531, 534, "the carrier ought not to be allowed to retain his illegal profit, and the only one who can take it away from him is the one that alone was in relation with him and from whom the carrier took the sum." This right of reparation for specific overcharge is left undisturbed by the Transportation Act. It would be clearly within the power of Congress to restrict reparation to the consignee or whoever finally sustained the damage due to the overcharge. There is, of course, no reason why Congress should not now recognize the fact that the burden and final incidence of the excess earning to be conditionally permitted in order to sustain competition in service, and to regulate commerce, would fall upon the general public, made up of indistinguishable persons and inadmeasurable amounts, and should, therefore, be recovered and administered by Congress for the general benefit of the public interest in transportation.

NO SEPARATION OF INTRASTATE AND INTERSTATE EARNINGS.

The purpose of Congress to deal with carrier revenue as a whole, as Section 422 deals with rate adjustments as a whole, is clear from the recapture clause.

This excess earnings reduction involves no unconstitutional recapture of the earnings resulting from intrastate operations. Only about 25 per cent of the traffic of the railroads is intrastate, and about 30 per cent of the revenue is derived from intrastate business. It is common knowledge that intrastate operations are more expensive and the proportion of net earnings less, so, as a clearly established general rule the net earnings of interstate carriers will rarely ever equal one-third of their total. As it is proposed to permit them to retain all of their net earnings up to 6 per cent and one-half of the excess, it is clear that as a general rule this one-half will give them more than their total net earnings (not already embraced in the original 6 per cent) from intrastate revenue. If extraordinary cases exist, in which this shall appear not to be true, the railroad has recourse to the Commission under the reasonable rules to be prescribed by it pursuant to the Act or to the courts to permit it to retain a greater percentage of its excess earnings over the standard of 6 per cent plus the stipulated division over that ratio, if any contention could be asserted that the railroad is entitled to immunity in respect of its intrastate earnings.

It is, accordingly, apparent that what are objected to as novel features are mere details in the mechanism employed to work out an established principle. At the time of the decision of *Munn v. Illinois* and the *Granger Cases*, it was asserted that regulation of rates meant the destruction of efficiency and energy, just as the opponents of this measure asserted that the proposal "is fraught with consequences to our institutions and to our national safety too serious to be encountered."

The opposing argument now and the argument then is the same and both have been properly characterized by the Supreme Court:

> *"Against that conservatism of the mind which puts to question every new act of regulating legislation, and regards the legislation invalid or dangerous until it has become familiar, Government—State and National—has pressed on in the general welfare."*

The final draft of the clause relating to the regulation of excess earnings fixed upon a flat 6 per cent as a point for the beginning of the division of the excess earnings between the railroad earning them and the transportation fund. To preserve the rational theory of the process the statute should preferably have provided for the recapture of one-half of all earnings "over 6 per cent, or *over such greater percentage as might in particular cases and after hearing be found by the Commission to constitute a fair and reasonable return.*" This flexibility was always recommended by the proponents of this provision for the regulation of excess earnings. Section 17 (line 18, p. 26) of Senate Bill 5679, introduced by Senator Underwood March 3, 1919 (printed in Congressional Record of that date); also sections 11 and 14 of revised draft of bill embodying the "Warfield" Plan (National Association of Owners of Railroad Securities), printed in Hearings, House Committee on Interstate and Foreign Commerce (pp. 2834–5–6); also statement of the writer, *ib.* p. 1062.

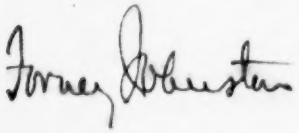
If the courts should in any case on refusal by any carrier earning over 6 per cent to pay over the stipulated portion of the excess find that 6 per cent and one-half of the excess over 6 per cent constitute an inadequate ratio to be retained by the carrier, the recovery of excess in that particular case would fail, and Congress might be compelled to supply the necessary flexibility above indicated; for all carriers must be permitted to realize a reasonable return upon the fair value of their individual railway property, if earned. As a practical question it is not likely that the courts would hold 6 per cent, and the permitted moiety over 6 per cent, to be unreasonably low or confiscatory under the provisions of this Act, even if the Commission should for the purposes of the general rate level for the group find a greater rate of return than 6 per cent to be the fair aggregate return to be realized upon the aggregate group valuations.

It is readily conceivable that a 7 per cent group level or higher might be necessary to enable essential carriers to survive under the difficult conditions, high interest rates and under-maintenance of to-day. Under a 6 per cent level actually realized many of them will earn as little as 2, 3, 4, or 5 per cent or less on the value of their respective properties.

For the reasons stated it would have been in the interest of sound theory if the recapture ratio had been made flexible, so as to meet any possible determination of the courts as to the reasonableness of the 6 per cent limitation.

However, in administering this provision the Commission will undoubtedly provide for hearings, under its power under paragraph 9 of Section 422, to prescribe rules and regulations for the determination and recovery of excess earnings, so as to avoid the consequences condemned in *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418.

The Transportation Act, 1920, marks the beginning of the final era of railroad regulation in the United States. If its complete program of constructive regulation fails to sustain the carriers or to serve the public there is no alternative save for the Federal Government to assume the duty of transportation. For this reason, the attacks upon the act discovered by this record are of profound significance.



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